(27,776)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 419.

TOM J. TERRAL, AS SECRETARY OF STATE OF THE STATE OF ARKANSAS, APPELLANT,

vs.

BURKE CONSTRUCTION COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 14, 1920.

1 In the District Court of the United States for the Eastern District of Arkansas, Western Division.

Be it remembered, that on the seventeenth day of April, A. D. 1920, came into the office of the Clerk of the District Court of the United States for the Eastern District of Arkansas, Western Division, Burke Construction Company, by James B. McDonough and James D. Head, Escs., its attorneys, and filed therein its Bill of Complaint against Tom J. Terral, Secretary of State of the State of Arkansas, which Bill of Complaint is in words and figures as follows, to-wit:

In the District Court of the United States for the Western Division of the Eastern District of Arkansas.

BURKE CONSTRUCTION COMPANY, Plaintiff,

vs.

TOM J. TERRAL, as Secretary of State of the State of Arkansas, Defendant.

Bill of Complaint.

To the Honorable Judges of the United States District Court for the Western Division of the Eastern District of Arkansas:

Burke Construction Company, a corporation organized and existing under the laws of the State of Missouri, brings this, its bill of complaint, against Tom J. Terral, as Secretary of State of the State of Arkansas, and thereupon complainant says:

1.

(*a*) That it is a corporation organized and existing under
2 the laws of the State of Missouri and is a citizen and resident of the State of Missouri and a non-resident of the State of Arkansas.

(*b*) The defendant is a citizen of the State of Arkansas and a resident of the Western Division of the Eastern District of Arkansas, and is the duly elected, qualified and acting Secretary of State of the State of Arkansas.

(*c*) That Section 6 of Article 12 of the Constitution of the State of Arkansas is as follows:

"Corporations may be formed under the general laws; which laws may, from time to time, be altered or repealed. The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing, and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever, in their

opinion, it may be injurious to the citizens of this State; in such manner, however, that no injustice shall be done to the corporation."

(*d*) That Section 11 of Article 12 of the Constitution of Arkansas is as follows:

"Foreign corporations may be authorized to do business in this State, under such limitations and restrictions as may be prescribed by law; provided, that no such corporation shall do any business in this State, except while it maintains therein one or more known places of business, and an authorized agent or agents in the same upon whom process may be served; and, as to contracts made or business done in this State, they shall be subject to the same regulations limitations and liabilities as like corporations of this State; and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this State; nor shall they have power to condemn or appropriate private property."

(*e*) That the Legislature of the State of Arkansas passed
3 an Act, approved May 13, 1907, prescribing the conditions upon which foreign corporations would thereafter be licensed to do business in the State of Arkansas, said Act being entitled: "An Act to Permit Foreign Corporations to do Business in Arkansas and Fixing Fees to be Paid by all Corporations." Said Act is as follows:

"Section 1. Every company or corporation incorporated under the laws of any other state, territory or country, including foreign railroads and foreign fire and life insurance companies, now or hereafter doing business in this State, shall file in the office of the Secretary of State of this State a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation duly authenticated and certified by the proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this state, and shall also designate it a general office or place of business in this state, and shall name an agent upon whom process may be served. Provided, before authority is granted to any foreign corporation to do business in this state, it must file with the Secretary of State a resolution adopted by its Board of Directors, consenting that service of process upon any agent of such company in this state, or upon the Secretary of State of this State, in any action brought or pending in this state, shall be a valid service upon said company; and if process is served upon the Secretary of State, it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this state, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the Secretary of
4 State to forthwith revoke all authority of such company and its agents to do business in this state, and to publish such revocation in some newspaper of general circulation published in the state; and if such corporation shall thereafter continue to do business

in this State, it shall be subject to the penalty of this Act for each day it shall continue to do business in this state after such revocation.

"Section 2. Any foreign corporation which shall fail to comply with the provisions of this act, and shall do any business in this state, shall be subject to a fine of not less than $1,000.00 to be recovered before any court of competent jurisdiction, and all such fines so recovered shall be paid into the general revenue fund of the county in which the cause of action shall accrue, and it is hereby made the duty of the prosecuting attorneys to institute said suits in the name of the state, for the use and benefit of the county in which the suit is brought, and such prosecuting attorney shall receive as his compensation one-fourth of the amount recovered, and as an additional penalty, any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid, cannot make any contract in this state which can be enforced by it either in law or in equity, and the complying with the provisions of this act after suit is instituted shall in no way validate said contract.

"Section 3. That all corporations hereafter incorporated in this state and all foreign corporations seeking to do business in this state, shall pay into the treasury of this state for the filing of said articles a fee of $25.00 where the capital stock is $50,000 or under; $75.00 where the capital stock is over $50,000 and not more than $100,000; and $25.00 additional for each $100,000 capital stock.

"Any foreign mutual corporation having no capital stock shall be required to pay to the Secretary of State for filing its articles of incorporation the sum of $500. Provided, however, nothing in this section shall apply to fraternal orders that write insurance.

"Section 4. That Act 185, approved April 17, 1907, and entitled 'An Act to Provide a Manner in which Foreign Insurance Corporations may become Domestic Corporations, and for Other Purposes', and all laws and parts of laws in conflict herewith be, and the same are, hereby repealed; and that this act shall take effect and be in force from and after its passage."

(*f*) The above sections of the Constitution and provisions of the laws of the State of Arkansas, were in full force and effect on the — day of ——, 1920, and were not limited in effect by any other laws on the same subject.

II.

Complainant states that it was organized for the purpose, among other things, of doing a general road and other construction work, and that *is* is actually engaged in such construction work in the state of Arkansas, with offices at Fort Smith in the State of Arkansas, and that in the course of its operations it is engaged in interstate commerce and receives and ships much freight in interstate commerce in the State of Arkansas. That it maintains an office in the State of

Missouri and has agents in said State and that many of the shipments of material purchased by it for its construction work are shipments made in interstate commerce and likewise at times it makes shipments of materials and equipment in interstatae commerce, purchasing in other states materials which *in* shipped to it in the State of Arkansas and shipping from the State of Arkansas to other states materials and equipments of various kinds.

(*b*) That desiring to conduct its construction work in the State of Arkansas, as well as to carry on the interstate business above set forth, it did on the — day of —— 1916, apply to the Secre-
6 tary of State of the State of Arkansas for license to do business in Arkansas as a foreign corporation and complied with the conditions made conditions precedent by the Act of the Legislature of the State of Arkansas, approved May 13, 1907, for foreign corporations doing business in the State of Arkansas by filing in the office of the Secretary of State of the State of Arkansas a copy of its charter or Articles of Incorporation, duly authenticated and certified by the Secretary of State for the State of Missouri, together with a statement of its assets and liabilities and the amount of its capital employed in Arkansas, and by a proper certificate filed in the office of the Secretary of State did designate Fort Smith, Arkansas, as its general office or place of business in Arkansas, and named and designated M. C. Burke, of Fort Smith, Arkansas, as agent upon whom process might be served, and it also filed with said Secretary of State a resolution adopted by its Board of Directors, duly certified, consenting that service of process upon any of its agents in the State of Arkansas, or upon the Secretary of State of the State of Arkansas should be a valid service upon it.

Complainant alleges that it paid into the treasury of the State of Arkansas all the fees required under the provisions of Section 3 of the Act of May 13, 1907, and all acts amendatory thereof, and thereupon the Secretary of State issued to it license authorizing and permitting it to do business within the State of Arkansas.

(*c*) It avers that it thereupon became entitled, under and by virtue of the provisions of Section 12 of the Constitution of the State of Arkansas, to all the rights and privileges and subject to all the penalties conferred or imposed by the laws of the State of Arkansas upon similar corporations formed and existing under the laws of said State.

7 III.

(*a*) Complainant states that the right to do business in the State of Arkansas as a foreign corporation, enjoying all the privileges of domestic corporations, which right it acquired by virtue of compliance with the aforesaid provisions of the Act of May 13, 1907, made conditions precedent to granting it a license to do business in the State of Arkansas, is a valuable right and that availing itself of the rights and privileges guaranteed to it by the aforesaid contract with the State of Arkansas, it has expended in the acquisition of

property and the establishment of its interstate business in the State of Arkansas several hundred thousand dollars, and that it now owns large tracts of lands, valuable machinery and other property in the State of Arkansas, aggregating in value $75,000.00.

(*b*) Complainant avers that notwithstanding the aforesaid contract entered into between it and the State of Arkansas the defendant, as Secretary of State, is now threatening to revoke its license to do business in Arkansas and to deprive it and its agents of the right to conduct its business in the said State, because complainant, acting under the constitution and laws of the United States without the consent of the parties defendant, brought a suit in the District Court of the United States for the Western District of Arkansas, Texarkana Division, against Paving Improvement District No. 20, and Milton Winham, John P. Kline, and Paul Huckins, and because it is seeking to remove to the District Court of the United States for the Western District of Arkansas, Texarkana Division, a suit brought by Paving District No. 20, by its Board of Commissioners, Milton Winham, John F. Kline and Paul Huckins, against it and other, both of which suits involve damages for alleged breach of contract growing out of a construction contract between your complainant and said Paving Improvement District No. 20.

(*c*) Complainant further avers that the defendant as Sec-
8 retary of State is claiming the right to revoke all authority of complainant and its agents to do business in the State of Arkansas, under and in pursuance of the following provisions of Section 1 of the said Act of May 13, 1907, and as above averred is threatening to immediately revoke said authority, viz:

"If any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation, published in this State, and if such corporation shall thereafter continue to do business in this State, it shall be subject to the penalty of this act for each day it shall continue to do business in this State after such revocation."

(*d*) Complainant avers that if the authority granted to it and its agents to do business in the State of Arkansas is revoked it will be subjected to a penalty of not less than $1,000 for each day it shall continue to do business in this State after such revocation; that so large a penalty would accrue during the period necessary to test in the courts the validity of the action of the Secretary of State in revoking complainant's authority to do business in the State that it would amount to a confiscation of its property if, at the end of litigation, it was decided that the exercise of the authority by the Secretary of State to revoke its license was valid and lawful; and unless the Secre-

tary of State is restrained and enjoined from revoking its authority to do business in this State, it will be denied the equal protection of the laws.

IV.

Complaint represents that the provisions of said Act of the
9 Legislature of Arkansas, approved May 13, 1907, requiring the Secretary of State to revoke the license and authority of foreign corporations to do business in the state who resort to the Federal Courts of the State to enforce or protect its property or other rights growing out of the contracts made or business done in the State, is contrary to and in violation of Section 11 of Article 12 of the Constitution of Arkansas, in that it denies to complainant, a foreign corporation, the same powers, privileges and franchises which are granted to like corporations of the state, and subjects foreign corporations to regulations, limitations and liabilities to which domestic corporations are not subjected.

(*b*) Complainant represents that said Act is contrary to and in violation of Section 2 of Article 3 of the Constitution of the United States, which provides that the judicial power of the United States shall extend to controversies between citizens of different states in that the effect of said Act is to defeat the jurisdiction of the Courts of the United States in controversies between citizens of different states by imposing such penalties upon the exercise of the right to resort to the Federal Courts as prohibits foreign corporations, doing business in the State of Arkansas, from exercising their constitutional right of litigating controversies in the Federal Courts where diversity of citizenship exists and the Federal Courts otherwise have jurisdiction between citizens of different states.

(*c*) Complainant represents that said Act, in authorizing the defendant as Secretary of State to revoke the license of complainant to do business within the State of Arkansas and to thereby deprive it of the rights, privileges and immunities granted to it by the Constitution of the State of Arkansas is an attempt to relieve the State of Arkansas from the performance of its part of the contract entered into as aforesaid with complainant when it issued license to complainant to do business in the State upon the performance by
10 complainant of the conditions precedent imposed by the laws of the State of Arkansas for the granting of license to foreign corporations to do business in the state, and is contrary to and in violation of Section 10 of Article 1 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligations of contracts.

(*d*) That the State of Arkansas, when it entered into said contract with complainant, undertook and agreed with complainant that it should not be subjected to any greater liabilities than is imposed by law upon domestic corporations and agreed that the liabilities, restrictions and duties imposed upon domestic corporations should measure and limit the liabilities, restrictions and duties which might

be imposed upon complainant; that there is no law in the State of Arkansas depriving domestic corporations of the right to resort to Federal Courts in proper cases, and therefore, the said Act of Arkansas, approved May 13, 1907, in so far as it authorizes the Secretary of State to revoke the license of any foreign corporations which resort to the Federal Courts, is an impairment of the obligations of the contract entered into between the State of Arkansas and complainant, and is in violation of Section 10, of Article 1 of the Constitution of the United States which provides that no state shall pass any law impairing the obligations of contracts, and illegally discriminates against complainant and denies it the equal protection of the laws of said State, contrary to the provisions of Section 2 of Article 14 of the Amendments to the Constitution of the United States.

(*e*) Complainant represents that the said Act, in attempting to authorize and empower the Secretary of State to revoke the authority of foreign corporations doing business in the State, upon resorting to the Federal Courts, is in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States, in that it deprives complainant of the right to use its property without the due process of law.

11 (*f*) Complainant represents that the said Act, in attempting to authorize and empower the Secretary of State to revoke the authority of foreign corporations doing business in the State, upon resorting to the Federal Courts, is in violation of Section 8 of Article 1 of the Constitution of the United States, being known as the Commerce Clause of the Constitution, in that it deprives the complainant of the right to use its property in Arkansas, in the conduct of commerce between the State of Arkansas and other States between which its material and equipment moves in the ordinary conduct of its business.

V.

Complainant represents that defendant as Secretary of State, or his deputies, will, unless restrained by the order of this Court, revoke the authority of complainant, and its agents, to do business in the State of Arkansas, and to use its property in said state in the transaction of its interstate business.

For amendment to bill complainant says an emergency exists in that the Secretary of State has set for hearing at 10 o'clock A. M. April 17, 1920, the matter of the cancellation — license and is threatening to cancel same, and that irreparable injury will result from such action as complainant is engaged in performing public contracts, and if such cancellation should be made, then all such works would cease and great damage would result to complainant.

That the amount in controversy, exclusive of interest and costs, greatly exceeds the sum or value of $5,000.00.

In consideration whereof, and for as much as complainant is remediless in the premises under the rules of common law, and is

only relievable in a court of equity where matters of this kind are properly cognizable, complainant prays:

1. That the aforesaid act of the legislature of Arkansas, approved May 13, 1907, in so far as it undertakes to empower and authorize defendant to revoke the authority of complainant and its
12 agents to do business in the State of Arkansas be declared unconstitutional and void.

2. That the defendant, Tom J. Terral, and his deputies, and successors in office, be temporarily and permanently enjoined and restrained from revoking the license of complainant to do business in Arkansas and from taking any steps to that end.

3. That complainant have such other and further relief as may be just and equitable.

4. And in the meantime, and until hearing hereof, complainant may have a temporary restraining order, embracing and containing all of the relief herein prayed for; such restraining order to continue in force until the determination of the hearing for perpetual injunction, and until the further orders of the Court.

May it please your Honor to grant unto complainant a subpœna of the United States of America, issued out of and under the seal of this Honorable Court, directed to Tom J. Terral, the defendant herein, commanding on a day certain, therein to be named, and under certain penalty to be and appear before this Honorable Court, then and there to answer, but not under oath (an answer under oath being hereby expressly waived) all and singular the premises and to stand to, perform and abide such order, directions or decree as may be made against him in the premises as shall seem meet and agreeable in equity and good conscience, and complainant as in duty bound will ever pray.

(Signed) JAMES B. McDONOUGH,
JAMES D. HEAD,
Attorneys for Complainant.

UNITED STATES OF AMERICA,
State of Arkansas,
County of Pulaski:

Comes M. C. Burke, and on oath says, that he is President o Burke Construction Company, and that he makes this affi
13 davit for said company and on its behalf; that he has rea the allegations contained in the complaint and knows th contents thereof; and that the said allegations are true to the best o his knowledge, information and belief.

(Signed) M. C. BURKE.

Subscribed and sworn to before me this the 17th day of April, 1920.

[SEAL.] SID. B. REDDING,
Clerk,

(Signed) By W. P. FEILD, JR.,
D. C.

Endorsed: Filed April 17, 1920. Sid. B. Redding, clerk, by W. P. Feild, Jr., D. C.

14 UNITED STATES OF AMERICA,
Eastern District of Arkansas,
Western Division:

Be it remembered, that at a District Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday the Fifth day of April, Anno Domini, One Thousand Nine Hundred and Twenty, at the United States Court Room, in the City of Little Rock, Arkansas, the Honorable Jacob Trieber, District Judge presiding and holding said Court, the following proceedings were had, to-wit: on April 17th, 1920:

No. 1983, Eq.

BURKE CONSTRUCTION COMPANY

VS.

TOM J. TERRAL, as Secretary of State of the State of Arkansas.

On this day is presented the verified bill of complaint of the plaintiff, asking for an injunction against the said defendant as Secretary of State of the State of Arkansas, to restrain and enjoin him from cancelling or revoking the permit of the said plaintiff, a foreign corporation, from doing business in the State of Arkansas.

Whereupon, it was ordered by me that the said Secretary of State show cause on Tuesday, April 27th, 1920, at 9.30 a. m. in the United States Court Room at Little Rock, Arkansas, why a temporary injunction should not be granted.

And it appearing from the verified complaint that the said defendant is to take action in this matter at ten o'clock a. m. on this day, and unless restrained he will take such action, it is, therefore, ordered that the said defendant, Tom J. Terral, as Secretary of State of the State of Arkansas, be and he is hereby restrained from revok-
15 ing or cancelling the permit of the said plaintiff corporation to do business in the State of Arkansas until the further hearing of this cause, and the restraining order to take effect upon the plaintiff executing a bond in the sum of One Thousand Dollars, conditioned as required by law.

It is further ordered that a copy of this order be served upon the defendant, and also upon the Governor and Attorney General of the State of Arkansas.

And I hereby designate the Honorable Kimbrough Stone, U. S. Circuit Judge for the Eighth Circuit, and Honorable Charles B. Faris, U. S. District Judge for the Eastern District of Missouri, to sit with me at the hearing of the application for the temporary injunction.

(Signed) JACOB TRIEBER,
U. S. District Judge.

And on the same day the following proceedings were had, to-wit:

No. 1983, Eq.

BURKE CONSTRUCTION COMPANY

vs.

TOM J. TERRAL, as Secretary of State of the State of Arkansas.

Comes the plaintiff by James D. Head, Esq., its attorney, and file herein its bond in the sum of One Thousand Dollars, conditioned a required by law, which bond is approved by the Judge of this Court

Which bond is as follows:

In the District Court of the United States for the Western Division o the Eastern District of Arkansas.

BURKE CONSTRUCTION COMPANY, Plaintiff,

vs.

TOM J. TERRAL, as Secretary of State of the State of Arkansas.

16 *Bond.*

We are held and firmly bound by these presents to the defendan Tom. J. Terral, as Secretary of State for the State of Arkansas, in th sum of One Thousand Dollars ($1,000.00); the conditions of this ob ligation are such that,

Whereas, an order has issued herein for the defendant to sho cause why a temporary restraining order should not issue herein an that pending said hearing the said defendant be restrained and e joined from doing any acts as commanded in said order;

Now, therefore, if it be decided at the hearing that said tempora

restraining order was rightfully issued, then this obligation shall be void, otherwise to remain in full force and effect.

Witness our hands this the 17th day of April, A. D. 1920.

(Signed) BURKE CONSTRUCTION CO.,
By M. C. BURKE, [SEAL.]
President.
UNION INDEMNITY CO.,
By M. W. HARDY, [SEAL.]
Vice President.

Approved by
(Signed) JACOB TRIEBER,
Judge.

Endorsed: Filed April 17, 1920. Sid. B. Redding, clerk, by W. P. Feild, Jr., D. C.

17 And on April 21st, 1920, the following proceedings were had, to-wit:

No. 1983, Eq.

BURKE CONSTRUCTION COMPANY

vs.

TOM J. TERRAL, as Secretary of State of the State of Arkansas.

Come the parties hereto, by their respective attorneys, and file herein their stipulation for the continuance of the temporary restraining order pending the final hearing of said cause.

Which Stipulation of Counsel is as follows:

In the District Court of the United States for the Western Division of the Eastern District of Arkansas.

BURKE CONSTRUCTION COMPANY, Plaintiff,

vs.

TOM J. TERRAL, as Secretary of State of the State of Arkansas, Defendant.

Stipulation.

It is hereby stipulated by and between the plaintiff and the defendant that the temporary restraining order issued out of this Court, on the 17th day of April, 1920, restraining the said Tom J. Terral from taking any action in the revocation of the permit of the Burke Construction Company to do business in Arkansas, may be continued in full force and effect until the final hearing of this cause.

It is further stipulated and agreed by and between the parties hereto that this cause may be submitted on final hearing to the Court at any time convenient to the Court prior to the first day of June. 1920.

(Signed) BURKE CONSTRUCTION COMPANY,
Plaintiff,

By JAMES D. HEAD,
Its Attorney.

18 TOM J. TERRAL,
Secretary of State of the State of Arkansas, Defendant,
By JOHN D. ARBUCKLE AND
FRANK S. QUINN,
His Attorneys.

Endorsed: Filed April 21st, 1920. Sid. B. Redding, clerk, by W. P. Feild, Jr., D. C.

And on May 17th, 1920, the following proceedings, were had to-wit:

No. 1983, Eq.

BURKE CONSTRUCTION COMPANY

vs.

TOM J. TERRAL, as Secretary of State of the State of Arkansas.

Comes the defendant, by John D. Arbuckle, Attorney General of the State of Arkansas, and Frank S. Quinn, Esq., his attorneys, and files herein his answer.

Which answer of the defendant is as follows, to-wit:

19 District Court of the United States, Eastern District of Arkansas, Western Division.

In Equity.

BURKE CONSTRUCTION COMPANY, Plaintiff,

vs.

TOM J. TERRAL, Secretary of State of the State of Arkansas, Defendant.

Answer.

Comes the defendant Tom J. Terral, as Secretary of State of the State of Arkansas, by John D. Arbuckle, Attorney General of said State and Frank S. Quinn, his attorneys, and for answer to the Bill of Complaint of the plaintiff, the Burke Construction Company, respectfully states, shows and alleges:

I.

The defendant is not in possession of sufficient information at the present time to justify a belief that the plaintiff the Burke Construction Company is now, or was at the time of the filing of this suit, a corporation then existing under the laws of the State of Missouri, and therefore denies the same; and for the same reason denies that said plaintiff is now or was at the time of the filing of this suit a citizen or resident of the said State of Missouri, and defendant demands proof of these matters. Defendant states that he is a resident of the State of Arkansas, and the duly qualified and acting Secretary of State for said State.

The defendant understands that the various section- of the Constitution and laws of Arkansas are as set out in Section 1 of plaintiff's complaint.

II.

The defendant denies that the plaintiff was organized for the purpose among others of doing a general road and construction work; denies that the plaintiff is now actually engaged in such construction work in the State of Arkansas; denies that it is engaged in any manner in interstate commerce; and denies that it receives and ships much freight, or any freight, in interstate commerce; denies that the plaintiff has offices in the State of Missouri or an agent or agents in said State; denies that the shipments of materials purchased by plaintiff are shipments made in interstate commerce as far as this plaintiff is concerned; denies that the plaintiff makes shipments of materials and equipment in interstate commerce; denies that the plaintiff purchases and ships materials into this State; and denies that it ships materials and equipment from this State into other States.

Defendant states that said plaintiff was granted a license to do business in the State of Arkansas, on the 22nd day December, A. D. 1916, and defendant further states that by reason of having obtained permission to carry on its business in the State of Arkansas, it thereby became amenable to all the laws of said State regulating the carrying on of its business in this State.

III.

Defendant admits that plaintiff's right to do business in this State is a valuable right, and that compliance with the Act of 1907 is required as a condition precedent to the acquiring of said right. But defendant further states that there is a further provision in said Act of 1907 which prescribed and prescribes that corporations authorized to do business thereunder should not bring a suit against a citizen or citizens of this State in the United States Court or Courts. And defendant says that said Act further provides that the bringing of such a suit by the plaintiff required that the defendant as Secretary of the State of Arkansas, revoke the license of said plaintiff to do

business in this State, and that said condition of said Act became and was and is a part of the right of the plaintiff to carry on its said business; that the plaintiff took said license to do business
21 with the liabilities as well as the benefits and privileges accorded by said statute, and agreed to said liabilities as well as agreeing to accept the said benefits.

Defendant states that at the time of the bringing of this suit he was preparing as Secretary of State, as his duties require, to cancel the authority and license of the plaintiff to do business in this State, for the reason that the said plaintiff had brought in the District Court of the United States for the Texarkana Division of the Western District of Arkansas, its suit at law against Paving Improvement District Number Twenty of the City of Texarkana, Arkansas, an improvement district organized under the laws of the State of Arkansas and situated in the City of Texarkana in said State and against John P. Kline, Milton Winham, and Paul G. Huckins, individually and as members of the Board of Improvement of said District Number Twenty, each of whom are now and were at the time of the filing of said suit citizens and resident of the State of Arkansas. And defendant further shows that said plaintiff has removed from the Chancery Court of Miller County, Arkansas, a suit in equity therein, wherein said Paving Improvement District Number Twenty and said John P. Kline, Milton Winham and Paul G. Huckins are plaintiffs, and residents and citizens of the State of Arkansas, to the United States District Court for the Texarkana Division of the Western District of Arkansas.

Defendant shows that the bringing of said suit by the plaintiff as aforesaid in the United States Court, and the removal of said suit as aforesaid from the Chancery Court of Miller County, Arkansas, constituted and are violations of the license granted by the State of Arkansas to the plaintiff to do business in this State, and said conduct of the plaintiff authorizes and makes it the duty of the defendant to cancel its said license.

Defendant denies that the plaintiff has expended large sums of money, or several hundred thousand dollars, in the acquisi-
22 tion of property in this State by virtue of said license to do business in the State; and defendant has no information sufficient to form a belief that the plaintiff has or owns large tracts of land, or valuable machinery, or other property, in the State of Arkansas, and therefore denies the same.

IV.

Defendant denies that the Act of 1907, requiring the Secretary of State to revoke the license of foreign corporations to do business in this State, is contrary to or in violation of Section 11 of Article 12 of the Constitution of the State of Arkansas, in any manner; denies that said Act is in violation of Section 2 of Article 3 of the Constitution of the United States; denies that said Act of 1907 is in violation of Section 10 of Article 1 of the Constitution of the United States, in any manner, and denies that the said Act is contrary to

the provisions of Section 2 of Article 14 of the Amendments to the Constitution of the United States; and denies that said Act is in violation of Section 1 of Article 14 of the Constitution of the United States; and denies that said Act is in violation of Section 8 of Article 1 of the Constitution of the United States.

V.

Defendant denies that the complainant is entitled to any relief whatever, or any part of the relief in said Bill of Complaint demanded, and alleges that this complainant has no standing in this Court or in any Court of Equity. And defendant prays in all things the same benefit and advantages of this its answer, as if it had pleaded or demurred to said Bill of Complaint. And defendant denies all and all manner of unlawful acts whatsoever whereof he is any wise by said Bill of Complaint charged. All of which matters and things this defendant is ready and willing to prove as this Honorable Court shall direct; and prays that the plaintiff take nothing by this suit; that the temporary order enjoining this defendant from proceeding to revoke the license of said plain-
23 tiff to do business in this State, be set aside, and that the defendant be hence dismissed with his reasonable charges and costs in this behalf sustained.

(Signed) TOM J. TERRAL,
As Secretary of State of the State of Arkansas, Defendant.
JOHN D. ARBUCKLE,
Attorney General,
FRANK S. QUINN,
Solicitors for Defendant.

Endorsed: Filed May 17, 1920. Sid. B. Redding, clerk, by W. P. Feild, Jr., D. C.

And on May 31st, 1920, the following proceedings were had, to-wit:

No. 1983, Eq.

BURKE CONSTRUCTION COMPANY
vs.
TOM J. TERRAL, as Secretary of State of the State of Arkansas.

Final Decree.

On this day there came on for trial the above entitled cause, the plaintiff appeared by its attorney, James B. McDonough and the defendant appeared by the Attorney General, the Honorable John D. Arbuckle, and also by Frank S. Quinn. Both parties announced ready for trial.

Upon the complaint and answer, and upon the statements of counsel in open Court, the Court finds that the Act of the General

Assembly of the State of Arkansas, being the Act of May 13, 1907, purporting to authorize the Secretary of State to forfeit the license of a foreign corporation to do business in the State of Arkansas is illegal and void, being contrary to Sections one and two of the Fourteenth Amendment to the Constitution of the United States.

It is, therefore, by the Court ordered, adjudged and considered that the defendant, Tom J. Terral, as Secretary of State of the State of Arkansas, and his assistants, agents, attorneys and representatives be and they are hereby forever enjoined and restrained from
24 in any manner forfeiting the license of the Burke Construction Company, a corporation organized under the laws of the State of Missouri, to do business in the State of Arkansas.

It is further ordered, adjudged and considered that the plaintiff shall have and recover of and from the defendant all costs in this action laid out and expended. As to said costs it is further ordered, adjudged and decreed that execution thereon be suspended until the Legislature of the State of Arkansas shall have had an opportunity to enact the legislation for the payment of said costs.

And the defendant excepted to the finding of the Court, and prayed an appeal to the Supreme Court of the United States, and having filed the Assignment of Errors, it is granted, returnable in thirty days, upon execution of a cost bond in the sum of Three Hundred Dollars.

(Signed) JACOB TRIEBER,
U. S. District Judge.

Which Petition for Appeal is as follows, to-wit:

In the District Court of the United States for the Western Division of the Eastern District of Arkansas.

In Equity.

BURKE CONSTRUCTION COMPANY, Plaintiff,

vs.

TOM J. TERRAL, as Secretary of State of the State of Arkansas, Defendant.

Petition for Appeal.

Now comes Tom J. Terral, as Secretary of State of the State
25 of Arkansas, the defendant herein, by his solicitors, John D. Arbuckle, Attorney General of Arkansas, and Frank S. Quinn, and respectfully shows to the Court that he considers himself aggrieved by the order of this Court entered on the 31st day of May, A. D. 1920, in the above entitled proceedings, and he doth hereby appeal from the said order and decree to the Supreme Court of the United States, and he prays that his appeal may be allowed; and that a transcript of the record and proceedings and papers upon

which said order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

And defendant hereto attaches his assignment or errors.

(Signed) TOM J. TERRAL,
As Secretary of State of the State of Arkansas, Defendant.
JOHN D. ARBUCKLE,
Attorney General of Arkansas,
FRANK S. QUINN,
Solicitors for Defendant.

Endorsed: Filed May 31st, 1920. Sid. B. Redding, clerk, by W. P. Feild, Jr., D. C.

Which Assignment of Errors is as follows, to-wit:

In the District Court of the United States for the Western Division of the Eastern District of Arkansas.

In Equity.

BURKE CONSTRUCTION COMPANY, Plaintiff,

vs.

TOM J. TERRAL, as Secretary of State of the State of Arkansas, Defendant.

Assignment of Errors.

Now comes the defendant, Tom J. Terral, as Secretary of State of the State of Arkansas, by John D. Arbuckle, Attorney General, and Frank S. Quinn, his solicitors, and for his Assignment of Errors herein, respectfully states and shows:

26

(1) That the Court erred in finding Act No. 313 of the Acts of the Legislature of the State of Arkansas, 1907, and approved May 13th, 1907, to be unconstitutional under the terms and provisions of the Constitution of the State of Arkansas 1874, and amendments thereto.

(2) That the Court erred in finding *that* the said Act No. 313 of 1907 of the Legislature of the State of Arkansas, to be unconstitutional and void under the terms and provisions of the Constitution and statutes of the United States.

(3) That the Court erred in finding *that* the rule of law to be applied in this particular case, not to be affected by the question whether the Burke Construction Company is engaged in interstate commerce or intra-state business.

(4) That the Court erred in making perpetual the temporary injunction heretofore granted in this cause.

(Signed) JOHN D. ARBUCKLE,
Attorney General, Arkansas,
FRANK S. QUINN,
Solicitors for Defendant.

Endorsed: Filed May 31st, 1920. Sid. B. Redding, clerk, by W. P. Feild, Jr., D. C.

And on June 16th, 1920, the following proceedings were had, to-wit:

No. 1983, Eq.

BURKE CONSTRUCTION COMPANY

vs.

TOM J. TERRAL, as Secretary of State of the State of Arkansas.

Comes the defendant, by John D. Arbuckle, Attorney General of Arkansas, and Frank S. Quinn, his attorneys, and presents
27 to the Court his appeal bond in the sum of Three Hundred Dollars, with Maryland Casualty Company, as surety, which bond is approved by the Judge of this Court as sufficient.

Which Appeal Bond is as follows:

In the District Court of the United States for the Western Division of the Eastern District of Arkansas.

In Equity.

BURKE CONSTRUCTION COMPANY, Plaintiff,

vs.

TOM J. TERRAL, as Secretary of State of the State of Arkansas, Defendant.

Bond on Appeal.

Know all men by these presents, that we, Tom J. Terral, Secretary of State of the State of Arkansas, as principal, and Maryland Casualty Company of Baltimore, Maryland, as surety, acknowledge ourselves to be jointly indebted to the Burke Con-truction Company, appellee in the above cause, in the sum of three hundred dollars, conditioned that—

Whereas, on the 31st day of May, A. D. 1920, in the District Court of the United States for the Eastern District of Arkansas, Western Division, in equity, in a suit depending in that Court wherein the Burke Construction Company was plaintiff and To

J. Terral, as Secretary of State of the State of Arkansas was defendant, a decree was rendered against the said Tom J. Terral, as Secretary of State of the State of Arkansas, and the said Tom J. Terral, as Secretary of State aforesaid, having obtained an appeal to the Supreme Court of the United States;

28 Now, if the said Tom J. Terral, as Secretary of State of the State of Arkansas, shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then this obligation to be void, otherwise to remain in full force and effect.

(Signed) TOM J. TERRAL,
As Secretary of State of the State of Arkansas, Principal.
[SEAL.] MARYLAND CASUALTY COMPANY,
By A. J. WILSON,
Attorney in Fact,
Surety.

Countersigned:
By ROSCOE R. LYNN,
Attorney in Fact.

Approved June 16th, 1920.
(Signed) JACOB TRIEBER,
Judge U. S. District Court,
Eastern District of Arkansas.

Endorsed: Filed June 16th, 1920. Sid. B. Redding, clerk, by W. P. Feild, Jr., D. C.

29 UNITED STATES OF AMERICA,
Eastern District of Arkansas,
Western Division:

I, Sid. B. Redding, Clerk of the District Court of the United States for the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct and compared copies of the originals remaining of record in my office, at Little Rock, Arkansas, of the Assignment of Errors, record, pleadings and all proceedings in the case of Burke Construction Company, plaintiff, against Tom J. Terral, as Secretary of State of the State of Arkansas.

In witness whereof, I have hereunto set my hand and the seal of said Court, this the nineteenth day of June, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America, the one hundred and forty-fourth.

Attest:

[The Seal of the District Court of East. Dist. Ark., Western Division, U. S. A.]

SID B. REDDING,
Clerk U. S. District Court,
Eastern District of Arkansas,
By W. P. FEILD, Jr.,
D. C.

30 [Endorsed:] In the U. S. District Court, Western Division, Eastern District of Arkansas. Lloyd England, receiver of State National Bank. Ex parte. Petition. Cockrill & Armistead, attys. for Lloyd England, receiver of State National Bank.

Endorsed on cover: File No. 27,776. E. Arkansas D. C. U. S. Term No. 419. Tom J. Terral, as Secretary of State of the State of Arkansas, appellant, vs. Burke Construction Company. Filed June 24th, 1920. File No. 27,776.

No. [redacted]93

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

TOM J. TERRAL, AS SECRETARY OF STATE OF THE STATE OF ARKANSAS, APPELLANT,

VS.

BURKE CONSTRUCTION COMPANY, APPELLEE.

BRIEF FOR APPELLANT.

J. S. UTLEY,
Attorney General,
FRANK S. QUINN,
Solicitors for Appellant.

No. 419.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

TOM J. TERRAL, AS SECRETARY OF STATE OF THE STATE OF ARKANSAS, APPELLANT,

VS.

BURKE CONSTRUCTION COMPANY, APPELLEE.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from the District Court of the United States for the Western Division of the Eastern District of Arkansas, in equity, Judge Jacob Trieber, presiding. The cause was heard in the lower court upon bill and answer. The suit involves the validity of Act No. 313 of the Acts of the General Assembly of the

State of Arkansas of the year 1907, and especially that part of said act generally known as the "Anti-Removal" clause.

The bill of complaint, filed April 17, 1920, alleges that the complainant, Burke Construction Company, is a corporation organized under the laws of the State of Missouri, and that the defendant, Tom J. Terral, is a citizen of the State of Arkansas and the Secretary of State of said state.

The bill proceeds to set out Sections 6 and 11, of Article 12, of the Constitution of the State of Arkansas, as follows:

> (Section 6.) "Corporations may be formed under the general laws; which laws may, from time to time, be altered or repealed. The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing, and revocable at the adoption of this Constitution, or any that may be hereafter created, whenever in their opinion, it may be injurious to the citizens of this state; in such manner, however, that no injustice shall be done to the corporation."
>
> (Section 11.) "Foreign corporations may be authorized to do business in this state, under such limitations and restrictions as may be prescribed by law; provided, that no such corporation shall do any business in this state, except while it maintains therein one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served; and as to contracts made or business done in this state, they shall be subject to the same regulations, limitations and liabilities as like corporations of this state; and shall exercise no other or greater powers, privileges or franchises

than may be exercised by like corporations of this state; nor shall they have power to condemn or appropriate private property" (Transcript of Record, pages 1 and 2).

The bill then states that the legislature of the State of Arkansas passed an act, approved May 13, 1907, prescribing the conditions upon which foreign corporations would thereafter be licensed to do business in the State of Arkansas, and the first section of which act is set out as follows:

> "Section 1. Every company or corporation incorporated under the laws of any other state, territory or country, including foreign railroads and foreign fire and life insurance companies, now or hereafter doing business in this state, shall file in the office of the Secretary of State of this state a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation duly authenticated and certified by the proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this state, and shall name an agent upon whom process may be served. Provided, before authority is granted to any foreign corporation to do business in this state, it must file with the Secretary of State a resolution adopted by its Board of Directors, consenting that service of process upon any agent of such company in this state, or upon the Secretary of State of this state, in any action brought or pending in this state, shall be a valid service upon said company; and if process is served upon the Secretary of State, it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court

> of this state, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the Secretary of State to forthwith revoke all authority of such company and its agents to do business in this state, and to publish such revocation in some newspaper of general circulation published in this state; and if such corporation shall thereafter continue to do business in this state, it shall be subject to the penalty of this act for each day it shall continue to do business in this state after such revocation" (Tr. of Record, page 2).

The bill further states that the complainant was organized among other things for the purpose of doing a general road and other construction work, and that it is actually engaged in such construction work in the State of Arkansas with offices at Fort Smith, and that in the course of its operations it is engaged in interstate commerce and receives and ships much freight in interstate commerce in the State of Arkansas; that it maintains an office in the State of Missouri and has agents in said state, and that many of the shipments of material purchased by it for its construction work are shipments made in interstate commerce, and likewise at times it makes shipments of material and equipment in interstate commerce, purchasing in other states materials which are shipped to it in the State of Arkansas, and shipping from the State of Arkansas to other states materials and equipment of various kinds.

That in the year 1916 complainant applied to the Secretary of State of the State of Arkansas for license to do

business in Arkansas as a foreign corporation, and complied with the conditions prescribed by the said Act of the Legislature of the State of Arkansas approved May 13, 1907; that by compliance with said act the complainant became entitled, under and by virtue of the provisions of Section 12 of the Constitution of the State of Arkansas, to all the rights and privileges and subject to all the penalties conferred or imposed by the laws of the State of Arkansas upon similar corporations formed and existing under the laws of the said state.

Complainant further states that the right to do business in the State of Arkansas which it acquired by virtue of compliance with the provisions of said Act of May 13, 1907, is a valuable right, that it has expended in the acquisition of property and in the establishing of its interstate business in the State of Arkansas several hundred thousand dollars, and that it now owns large tracts of land, valuable machinery and other property in the State of Arkansas aggregating in value $75,000.00.

The bill further states that the defendant, Tom J. Terral as Secretary of State, is threatening to revoke complainant's license to do business in Arkansas, because the complainant, without the consent of the parties defendant, brought a suit in the District Court of the United States for the Western District of Arkansas, Texarkana Division, against Paving Improvement District No. 20 and Milton Winham, John P. Kline and Paul Huckins, and because it is seeking to remove to the District Court of the United States for the Western District of Arkansas, Texarkana Division, a suit brought by Pav-

ing Improvement District No. 20 by its Board of Commissioners, Milton Winham, John P. Kline and Paul Huckins, against it and others, both of which suits involve damages for alleged breach of contract growing out of a construction contract between the complainant and said Paving Improvement District No. 20. That the defendant is claiming the right to revoke all authority of complainant to do business in the state under that part of Section 1 of said Act of May 13, 1907, reading as follows:

> "If any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this state, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this state, and to publish such revocation in some newspaper of general circulation, published in this state, and if such corporation shall thereafter continue to do business in this state, it shall be subject to the penalty of this act for each day it shall continue to do business in this state after such revocation" (Tr. of Record, page 5).

The bill further alleges that the provision of said Act of the legislature of Arkansas approved May 13, 1907, just quoted is contrary to and in violation of Section 11 of Article 12 of the Constitution of Arkansas in that it denies to complainant the same powers, privileges and franchises as are granted to like corporations of the state, and subjects the complainant to regulations, limitations and liabilities to which domestic corporations are

not subjected; and that said act is contrary to and in violation of Section 2 of Article 3 of the Constitution of the United States, which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and that the said act, in authorizing the defendant to revoke complainant's license, is an attempt to relieve the State of Arkansas from its part of the contract entered into with complainant when the state issued its license to complainant to do business in the state, and that said act is contrary to and in violation of Section 10 of Article 1 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligations of contracts, and that said act illegally discriminates against the complainant and denies it the equal protection of the laws of said state contrary to the provisions of Section 2 of Article 14 of the amendments to the Constitution of the United States; that said act is in violation of Section 1 of Article 14 of the amendments to the Constitution of the United States, and is in violation of Section 8 of Article 1 of the Constitution of the United States known as the "Commerce Clause" of the Constitution (Tr. of Record, pp. 6 and 7).

The prayer of the bill is that the said act of the legislature of Arkansas approved May 13, 1907, be declared unconstitutional and void, that the defendant, Tom J. Terral, and his deputies and successors in office be temporarily and permanently enjoined and restrained from revoking the license of the complainant to do business in said state.

A temporary restraining order was issued by Honorable Jacob Trieber, District Judge, on the 5th day of April, 1920, commanding the defendant to refrain from revoking or cancelling the license of the complainant to do business in the State of Arkansas, which temporary order was by agreement of counsel continued in effect until the cause could be submitted on final hearing (Tr. of Record, pages 9 to 12).

On May 17, 1920, the defendant filed its answer which denied that the complainant was at the time of filing the suit a citizen or resident of the State of Missouri, and demands proof thereof. The defendant admits that the various sections of the constitution and laws of Arkansas are as set out in Section 1 of plaintiff's complaint. The second and third sections of defendant's answer are as follows:

"The defendant denies that the plaintiff was organized for the purpose among other things of doing a general road and construction work; denies that the plaintiff is now actually engaged in such construction work in the State of Arkansas; denies that it is engaged in any manner in interstate commerce; and denies that it receives and ships much freight, or any freight, in interstate commerce; denies that the plaintiff has offices in the State of Missouri or an agent or agents in said state; denies that the shipments of materials purchased by plaintiff are shipments made in interstate commerce as far as this plaintiff is concerned; denies that the plaintiff makes shipments of materials and equipment in in-

terstate commerce; denies that the plaintiff purchases and ships materials into this state; and denies that it ships materials and equipment from this state into other states."

"Defendant states that said plaintiff was granted a license to do business in the State of Arkansas, on the 22nd day of December, A. D., 1916, and defendant further states that by reason of having obtained permission to carry on its business in the State of Arkansas, it thereby became amenable to all the laws of said state regulating the carrying on of its business in this state."

"III. Defendant admits that plaintiff's right to do business in this state is a valuable right, and that compliance with the Act of 1907 is required as a condition precedent to the acquiring of said right. But defendant further states that there is a further provision in said Act of 1907 which prescribed and prescribes that corporations authorized to do business thereunder should not bring a suit against a citizen or citizens of this state in the United States Court or Courts. And defendant says that said act further provides that the bringing of such a suit by the plaintiff required that the defendant as Secretary of the State of Arkansas, revoke the license of said plaintiff to do business in this state, and that said condition of said act became and was and is a part of the right of the plaintiff to carry on its said business; that the plaintiff took said license to do business with the liabilities as well as the benefits and privileges accorded by said statute, and agreed to said liabilities as well as agreeing to accept the said benefits.

"Defendant states that at the time of the bringing of this suit he was preparing as Secretary of State, as his duties require, to cancel the authority and license of the plaintiff to do business in this state, for the reason that the said plaintiff had brought in the District Court of the United States for the Texarkana Division of the Western District of Arkansas, its suit at law against Paving Improvement District number twenty of the City of Texarkana, Arkansas, an improvement district organized under the laws of the State of Arkansas and situated in the City of Texarkana in said state and against John P. Kline, Milton Winham, and Paul G. Huckins, individually and as members of the Board of Improvement of said District Number Twenty, each of whom are now and were at the time of the filing of said suit citizens and residents of the State of Arkansas. And defendant further shows that said plaintiff has removed from the Chancery Court of Miller County, Arkansas, a suit in equity therein, wherein said Paving Improvement District Number Twenty and said John P. Kline, Milton Winham and Paul G. Huckins are plaintiffs, and residents and citizens of the State of Arkansas, to the United States District Court for the Texarkana Division of the Western District of Arkansas."

"Defendant shows that the bringing of said suit by the plaintiff as aforesaid in the United States Court, and the removal of said suit as aforesaid from the Chancery Court of Miller County, Arkansas, constituted and are violations of the license granted by the State of Arkansas to the plaintiff to do business in this state, and said

conduct of the plaintiff authorizes and makes it the duty of the defendant to cancel its said license."

"Defendant denies that the plaintiff has expended large sums of money, or several hundred thousand dollars, in the acquisition of property in this state by virtue of said license to do business in the state; and defendant has no information sufficient to form a belief that the plaintiff has or owns large tracts of land, or valuable machinery, or other property, in the State of Arkansas, and therefore denies the same."

"The defendant denies that the Act of 1907 is contrary to or in violation of Section 11 of Article 12 of the Constitution of the State of Arkansas; denies that said act is in violation of Section 2 of Article 3 of the Constitution of the United States; denies that said act is in violation of Section 10 of Article 1 of the Constitution of the United States; and denies that it is contrary to the provisions of Section 2 of Article 14 of the amendments to the Constitution of the United States, and denies that it is in violation of Section 1 of Article 14 of the Constitution of the United States; and further denies that the act is in violation of Section 8 of Article 1 of the Constitution of the United States.

The defendant denies further that the complainant is entitled to any relief whatever, or any part of the relief in said bill of complaint demanded, and alleges that the complainant has no standing in this court, or in any court of equity. And defendant prays in all things the same benefit and advantages of this its answer as if it had pleaded or demurred to said bill of complaint. And

defendant denies all manner of unlawful acts whatsoever whereof he is in any wise by said bill of complaint charged, all of which matters and things he is ready and willing to prove; prays that the plaintiff take nothing by this suit; that the temporary order enjoining this defendant be set aside, that the defendant be hence dismissed with his reasonable charges and costs in this behalf expended" (Tr. of Record, page 15).

On May 31, 1920, the cause was heard upon the complaint and the answer, and a final decree rendered as follows:

"On this day there came on for trial the above entitled cause. The plaintiff appeared by its attorney, James B. McDonough, and the defendant appeared by the Attorney General, the Honorable John D. Arbuckle, and also by Frank S. Quinn. Both parties announced ready for trial.

"Upon the complaint and answer, and upon the statements of counsel in open court, the court finds that the Act of the General Assembly of the State of Arkansas, being the Act of May 13, 1907, purporting to authorize the Secretary of State to forfeit the license of a foreign corporation to do business in the State of Arkansas is illegal and void, being contrary to section one and two of the Fourteenth Amendment to the Constitution of the United States."

It is, therefore, by the court ordered, adjudged and considered that the defendant, Tom J. Terral, as Secretary of State of the State of Arkansas, and his assistants,

agents, attorneys and representatives be and they are hereby and forever enjoined and restrained from in any manner forfeiting the license of the Burke Construction Company, a corporation organized under the laws of the State of Missouri, to do business in the State of Arkansas."

"It is further ordered, adjudged and considered that the plaintiff shall have and recover of and from the defendant all costs in this action laid out and expended. As to said costs it is further ordered, adjudged and decreed that execution thereon be suspended until the Legislature of the State of Arkansas shall have had an opportunity to enact the legislation for the payment of said costs."

"And the defendant excepted to the finding of the court, and prayed an appeal to the Supreme Court of the United States, and having filed the assignment of errors, it is granted, returnable in thirty days, upon execution of a cost bond in the sum of three hundred dollars" (Tr. of Record, p. 15).

On the same day the defendant filed his petition for appeal with his assignment of errors, as follows:

"(1) That the court erred in finding Act No. 313 of the Acts of the Legislature of the State of Arkansas, 1907, and approved May 13th, 1907, to be unconstitutional under the terms and provisions of the Constitution of the State of Arkansas, 1874, and amendments thereto."

"(2) That the court erred in finding said Act No. 313 of 1907 of the Legislature of the State of Arkansas to be unconstitutional and void under the terms and provisions of the Constitution and statutes of the United States."

"(3) That the court erred in finding that the rule of law to be applied in this particular case, not to be affected by the question whether the Burke Construction Company is engaged in interstate commerce or intra-state business."

"(4) That the court erred in making perpetual the temporary injunction heretofore granted in this cause" (Tr. of Record, pages 16 to 18).

On June 16, 1920, the defendant presented his appeal bond in the sum of three hundred dollars, which bond was approved as sufficient (Tr. of Record, p. 18).

Certified copy of the proceedings in said cause was filed in this court on June 24, 1920 (Tr. of Record, p. 20).

ARGUMENT.

It is established by the bill and answer that the act attacked by the bill was passed by the General Assembly of Arkansas, and approved, in the year 1907; that the complainant was granted a license or permit to do business in the State of Arkansas under the said act in the year 1916; and that in the year 1920, while the act was in full force and effect, the complainant, the Burke Construction Company, brought its suit at law for damages for breach of contract against citizens and residents of the State of Arkansas, in the Federal Court, and also in the same year removed from the State Court to the Federal Court a suit in equity involving damages for breach of contract, brought against the complainant by citizens and residents of the State of Arkansas. It further appears that, because of the bringing of said suit at law by complainant in the Federal Court and the removal of said equity suit from the State Court to the Federal Court, the Secretary of State of the State of Arkansas was proceeding to cancel the license or permit of the complainant to do business in the state, as required by the terms of the act.

It is alleged in the bill that the complainant is engaged in interstate commerce, but this is denied in the answer. This averment in the bill is overcome by the denial in the answer.

Iowa v. *Illinois*, 147 U. S. 7, 37 L. ed. 55.

United States v. *Trans-Missouri Freight Ass'n*, 7 C. C. A. 15, 19 U. S. App. 36, 24 L. R. A. 73.

Peoples United States Bank v. *Gilson*, 88 C. C. A. 332, 161 Fed. 287.

The question as presented by the record upon this appeal is, whether the act in controversy is repugnant to the Constitution of the United States, as an undue requirement or regulation of a foreign corporation not engaged in interstate commerce.

The act was before the Supreme Court of Arkansas in the case of *State ex rel.* v. *Earle W. Hodges*, 114 Ark. 155, decided July 13, 1914. Its constitutionality was sustained as to corporations not engaged in interstate commerce. A full consideration of the act appears in the court's opinion, and we respectfully refer to that opinion as a clear statement of the validity of the act from appellant's viewpoint.

In *Doyle* v. *Continental Insurance Company*, 94 U. S. 535, this court decided that the State of Wisconsin had the right to cancel the license of a foreign insurance company on the ground of the removal of a suit to the Federal Court. Section 1 of the Wisconsin act provided that if any insurance company shall remove any suit or action from the state court to the Federal Court, it shall be the duty of the Secretary of State to revoke and recall the license of such company. This court said:

> "A license to a foreign corporation to enter a state does not involve a permanent right to remain, subject to the laws and Constitution of the United

States. Full power and control over its territories, citizens and business, belong to the state."

"If the state has the power to do an act, its intention or the reason by which it is influenced in doing it, cannot be inquired into."

"The statute of Wisconsin declares that if a foreign corporation shall remove any case from the state court into the federal court, contrary to the provisions of the Act of 1870, it shall be the duty of the Secretary of State immediately to cancel its license to do business within the state. If the state has the power to cancel the license, it has the power to judge of the cases in which the cancellation shall be made. It has the power to determine for what causes and in what manner the revocation shall be made."

"The effect of our decision in this respect is that the state may compel the foreign corporation to abstain from the federal courts, or to cease to do business in the state. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in the state; the state has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and without reference to the injustice, the prejudice, or the wrong that is alleged to exist, must determine the question. No right of the complainant under the constitution or laws of the United States, by its exclusion from the state, is infringed, and this is what the state now accomplishes."

In the case of *Prewitt* v. *Security Life Insurance Company*, 202 U. S. 246, the same question came before this court in construing a statute of the State of Kentucky. The statute provided that any foreign insurance company granted authority to do business in the state, who shall remove a suit to, or bring a suit in, the federal

court, shall have its license to do business in the state revoked. This court reviews at some length the Morse case, 87 U. S. 365, and the Doyle case, *supra*, and quotes with approval that part of the opinion in the Doyle case holding that an insurance company has no constitutional right to do business in a state. The court then further says:

> "In these two cases (the Morse case and the Doyle case) this court decided that any agreement made by a foreign insurance company not to remove a cause to the federal court, was void, whether made pursuant to a statute providing for such agreement, or in the absence of such a statute; but, that the state having power to exclude altogether a foreign corporation from doing business in the state, had power to enact a statute, which in addition to providing for the agreement mentioned, also provided that if the company did remove a case from the state court to a federal court, its right to do business in the state should cease, and its permit should be revoked. It was held that there was a distinction between the two propositions, and one might be held void and the other not."
>
> "As the state has the right to refuse permission to a foreign corporation to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial."

After the Doyle and Prewitt cases, came the decisions of this Court in *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1, and *Herndon* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 135, and Harrison, Sec. of *State* v. *St. Louis & San Francisco Ry.*

Co., 232 U. S. 318. This court in these cases held that state regulation of any nature whatever of interstate commerce was void. In the Herndon case, this court held the anti-removal act of Missouri to be void, because it interfered with interstate commerce. In that case the facts were that the Chicago, Rock Island and Pacific Railway Company was a carrier of interstate commerce, as well as a carrier of intrastate commerce, and under such facts, the act was, *as to the railway company*, unconstitutional and void. The court also laid stress on the fact that the railway company had entered the state *prior* to the passage of the anti-removal act, and and had acquired a large amount of property within the state, both of which circumstances are absent from the instant case.

In the Harrison case, 232 U. S. 318, the Oklahoma anti-removal act was before this court. The facts were that the St. Louis & San Francisco Railway Company was a carrier engaged in interstate commerce, and this court held the act to be void. Attention is called by the court to the Doyle and Prewitt cases, and the distinction between those cases and the case at bar was pointed out. Chief Justice White in speaking of the Doyle and Prewitt cases, said:

> "Those cases involved state legislation as to a subject over which there was complete state authority, that is, the exclusion from the state of a corporation which was so organized that it had no authority to do anything but a purely intrastate business, and the decisions rested upon the want of power to deprive a state of its rights to deal with a subject which was in its complete control, even though an unlawful motive might have impelled the state to exert its lawful power."

In *Donald* v. *Philadelphia & Reading R., Coal and Iron Company*, 241 U. S. 329, the question was again before this court. In that case the Railway, Coal & Iron Company was engaged in interstate as well as intrastate commerce. This court said:

> "Consideration of the Wisconsin statutes convinces us that they seek to prevent appellees *and other foreign commercial corporations* doing local business in the state from exercising their constitutional right to remove suits to the Federal courts. To accomplish this is beyond the power of the state."

The conclusion to be reached, as we conceive it, from the above decisions, is, that in determining the validity of the act in question in the present suit, the facts surrounding this particular case must control; if the Burke Construction Company is not engaged in interstate commerce and is not a foreign commercial corporation, then the act is constitutional as to that company, and its license to do business in Arkansas can be revoked. We submit that under the state of the record here, the Burke Construction Company is not a commercial corporation, and is not engaged in interstate commerce, and that the decisions of the Supreme Court of the United States in the Doyle and Prewitt cases should govern, and the decree of the District Court should be reversed.

J. S. UTLEY,
Attorney General,

FRANK S. QUINN,
Solicitors for Appellant.

April 12, 1921.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1921: No. 93.

TOM J. TERRAL, SECRETARY OF STATE, ETC., *Appellant,*

vs.

BURKE CONSTRUCTION CO., *Appellee.*

Appeal from the District Court of the United States for the Eastern District of Arkansas.

BRIEF FOR APPELLEE.

A State statute is void which provides that a foreign corporation's license to do business shall be revoked if it brings a suit in the Federal Court or removes a case to such Court.

WM. MARSHALL BULLITT,
Counsel for Appellee.

JAS. B. MCDONOUGH,
Of Counsel.

The Evening Post Job Printing Office, Inc., 154 Fulton St., N. Y.

INDEX.

LIST OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921: No. 93

TOM. J. TERRAL, Secretary of State, etc.,
Appellant

vs.

BURKE CONSTRUCTION CO.,
Appellee,

Appeal from the District Court of the United States for the Eastern District of Arkansas.

BRIEF FOR APPELLEE.

This appeal involves the constitutionality of the Arkansas "anti-removal" statute as applied to a foreign road-construction corporation, subsequently admitted to do business in Arkansas, and not doing any interstate or Federal business therein.

The lower court held the statute void upon the ground that the cases of *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535, and *Security Mutual* v. *Prewitt*, 202 U. S. 246 (relied on by the State) had been, in effect, overruled by the later cases cited in the margin.*

* *Western Union* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union*, 216 U. S. 146; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400; *Herndon* v. *C. R. I. & P. Ry. Co.*, 218 U. S. 135; *Harrison* v. *St. Louis & San Francisco R. Co.*, 232 U. S. 318; *N. Y. Life Ins. Co.* v. *Head*, 234 U. S. 149; *Missouri Pacific* v. *Larrabee*, 234 U. S. 459; *Wisconsin* v. *Phila. Reading Coal Co.*, 241 U. S. 329.

STATEMENT OF THE CASE.

In 1907, Arkansas, for the first time, adopted an "anti-removal" Act, which was a *verbatim* copy of Ky. Stat. § 631, which had then just been upheld in *Security Mutual* v. *Prewitt* (Act May 13, 1907, p. 744; Crawford & Moses Digest (1921 ed.) § 1825-1831).

The Arkansas Act provided that any foreign corporation might be admitted to do business in Arkansas upon filing with the Secretary of State a copy of its charter, a statement of its assets and liabilities, and a designation of its place of business with the name of an agent thereat, and a consent that service of process might be made on any agent or on the Secretary of State (perfectly unobjectionable requirements); but, it further provided, in the language of the Kentucky Statute (R. 2):

> "and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this state, *remove* said suit or proceeding *to any Federal court*, or *shall institute* any suit or proceedings against any citizen of this state *in any Federal court*, it shall be the duty of the Secretary of State to forthwith *revoke* all authority of such company and its agents to do business in this state, and to publish such revocation in some newspaper of general circulation published in this state;"

Thereafter on December 22, 1916,—and with full knowledge that Arkansas thus gave foreign corporations the option "to abstain from the Federal courts or to cease to do business in the State" (202 U. S. 252,

258),—the Burke Construction Co., a Missouri corporation, complied with the conditions of the Act, was granted a license to do business in Arkansas, entered the State, and engaged in certain general road-construction work therein—purely *intra*-state business (R. 4, 13).

In 1920, the Burke Co. *brought suit in the Federal Court* in Arkansas against certain citizens of that State; and also removed to such Federal Court a suit which those citizens had brought against it in the State Court (R. 5, 14).

Thereupon, *and solely for that reason,* the Secretary of State was preparing to revoke the Burke Co.'s license to do business in Arkansas (R. 7, 14).

The Burke Co. then filed this suit in the Federal Court to enjoin the threatened revocation of its license and obtained a temporary restraining order (R. 1, 9, 11); the Secretary of State filed his answer (R. 12); the case was heard on bill, answer, and the concession that the Burke Co. was a foreign corporation (R. 15; Sup. Rec. 15-16); and a final decree was entered holding the "anti-removal" Act to be void and granting a permanent injunction against the revocation of the license (R. 16).

ARGUMENT

The law is now well settled that a State statute providing for the revocation of a foreign corporation's license to do business in the State, if the company brings a suit in a Federal Court, or removes a case thereto, is void as applied to any company engaged in interstate commerce (*Wisconsin* v. *Phila. & Reading Coal Co.*, 241 U. S. 329).

THE PROBLEM INVOLVED.

But this Court has not *definitely* extended the same protection to a foreign company doing an *intra*-state business only, although the *grounds* of its decision in the *interstate* cases apply with equal force to companies doing an *intra*-state business only. The case of *intra*-state business is now squarely presented for decision.

No important constitutional question, not excepting the legal tender and income tax cases, has been the subject of such varied fortunes at the hands of this Court, as that relating to the power of a State to prescribe the terms of admission for foreign corporations to do business within its limits, or, as it is sometimes called, the question of "unconstitutional conditions".

A review of the decisions of this court on the validity of the anti-removal laws discloses that this subject, like many other questions of constitutional right, has not been without its troubles here, but after a varying

history of unsettled dispute, the subject has finally been set at rest by the court holding once and for all, as under every such constitutional question the court must finally hold, that "The judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious" (*Harrison* v. *San Francisco, &c., R.*, 232 U. S. 318, 328).

On the one hand, as first formulated by Chief Justice WAITE in his dissenting opinion in *Insurance Co.* v. *Morse*, 20 Wall. 445, 458, and adopted in *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535, 541, 542, and *Security Mutual* v. *Prewitt*, 202 U. S. 246, 257, the argument is that the State has the *absolute* right to admit or to exclude foreign corporations from the transaction of local business within its limits; that this right carries with it the lesser powers to impose such conditions of admission as it pleases, or to revoke the permission at any time; and that, as it has the right to revoke such permission without giving any reason therefor, the fact that it may give a good reason, a bad reason or none at all, cannot affect the validity of the unrestrained right to revoke, because the *reason* by which a State is influenced in doing an act within its power, cannot be inquired into.

On the other hand, the argument in *Insurance Co.* v. *Morse,* 20 Wall. 445, *Barron* v. *Burnside,* 121 U. S. 186, and of the dissenting Justices in the *Doyle* and *Prewitt* cases, is, that while the State may, perhaps, entirely prohibit a foreign corporation from transacting local business within its limits, yet it cannot make the right to continue to transact such business, dependent upon the surrender, or abstention from the exercise, of a constitutional right. That is to say, a State cannot be permitted to destroy a right granted by the Federal Constitution, under the guise of exercising a supposed privilege belonging to the State; and a State cannot abridge or destroy a Federal right by affixing any sort of penalty or disadvantage to the assertion of such Federal right by those entitled to its enjoyment.

The reconciliation of those opposing views has only recently been reached (*a*) by approaching the subject, not from the standpoint of the common law right of foreign corporations to enter or of the States to exclude them, but from the constitutional point of view of the *supremacy* of the Judiciary Article (III) of the Constitution, and (*b*) by a change in the conception of the nature of corporations, and of their rights under the "due process", "equal protection" and other clauses.

The doubt long existing in the minds both of the bar and of this Court, with respect to the scope of its decisions, is reflected by the fact that a statute which it was generally believed had been declared void in *Insurance Co.* v. *Morse,* 20 Wall. 445, was expressly

upheld two years later in *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; while ten years later, an almost identical statute was declared void in *Barron* v. *Burnside*, 121 U. S. 186, by a return to the rule of the *Morse* case; and the *Doyle* case's elaborate constitutional argument was thus cavalierly disposed of (p. 199):

> "The point of the decision *seems* to have been, that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which *appears* to be in conflict with the adjudication in *Insurance Co.* v. *Morse*, must be regarded as *not in judgment.*"

For twenty years, this Court, text writers, the State and lower Federal Courts, and the profession generally, believed that the question had been definitely settled against the validity of all such statutes (See authorities collated by Mr. Justice Day in 202 U. S. at pp. 263-266); but in 1906, in *Security Mutual* v. *Prewitt*, 202 U. S. 246, all the prior cases were considered, the above quoted language from *Barron* v. *Burnside* (which had been thought to overrule the *Doyle* case) was said to be *"inaccurate"*; "the reasoning in the *Doyle* case" was declared to be "good"; and the Kentucky "anti-removal" statute was upheld.

Mr. Justice DAY vigorously dissented and pointed out that "The principles announced in *Doyle* v. *Ins. Co.* and *Barron* v. *Burnside* are directly opposed the one to the other, and cannot both prevail" and said that

"the Court should not return to the *rejected* doctrine of the *Doyle* case" (202 U. S. at p. 266).

Within less than four years, the doctrine of the *Prewitt* case was limited in *Western Union* v. *Kansas*, 216 U. S. 1; while four dissenting Justices (including PECKHAM, *J.*, author of the *Prewitt* opinion) in turn expressed regret that the Court "so soon should *abandon* its latest decision, *Security Mutual* v. *Prewitt*" (216 U. S. 55).

A few weeks later the *Prewitt* case reasoning was further discredited and its application limited by *Pullman Co.* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union*, 216 U. S. 146, and *Southern Ry.* v. *Greene*, 216 U. S. 400; while three months later in *Herndon* v. *Chic. Rock Island & Pac. Ry.*, 218 U. S. 135, the Missouri "anti-removal" statute (which had been passed in view of the *Prewitt* decision) was held void as to a railroad company, without even so much as a passing reference to the *Prewitt* case!

Four years thereafter, an Oklahoma "anti-removal" statute (also passed after the *Prewitt* decision) providing for the revocation of the license of a foreign corporation which should remove a case to the Federal Court, was declared unconstitutional in *Harrison* v. *St. L. & San Francisco R.*, 232 U. S. 318, as applied to a railroad; the reasoning was irreconcilable with that of the *Prewitt* case; and reference was made to

> "the *extremely narrow scope* of the rulings in the *Doyle* and *Prewitt* cases" (232 U. S. 333).

The discrediting process was next continued in *New York Life* v. *Head*, 234 U. S. 149, where, in referring to the *Prewitt* case doctrine, it was said (p. 164):

> "But even if it be put out of view that this doctrine has been either expressly or by necessary implication *overruled* or at all events so restricted as to deprive it of all application to this case (see *Harrison* v. *St. L. & San Francisco R. Co.*, 232 U. S. 318, 332, and authorities there cited.) * * *"

Finally, in *Wisconsin* v. *Phila. & Reading Coal Co.*, 241 U. S. 329, the mildest of all the "anti-removal" statutes was held unconstitutional as applied to a telegraph or mercantile company, without a reference to the *Doyle* or *Prewitt* cases, which were the principal authorities cited by counsel to sustain the statute.

SUMMARY OF POINTS DISCUSSED.

1. **The Arkansas "anti-removal" Act, providing that if a foreign corporation shall sue in, or remove a case to, a Federal Court, the Secretary of State shall revoke its license, is unconstitutional because it seeks to prohibit, burden, and destroy a right guaranteed under the Constitution and laws of the United States (pp. 10-35, infra).**

2. **The present status (1) of this Court's decisions regarding the constitutionality of "anti-removal" statutes, and (2) of the Doyle and Prewitt cases, as authority (pp. 35-76, infra).**

FIRST POINT

The Arkansas "anti-removal" Act, providing that if a foreign corporation shall sue in, or remove a case to, a Federal Court, the Secretary of State shall revoke its license, is unconstitutional because it seeks to prohibit, burden and destroy a right guaranteed under the Constitution and laws of the United States.

The Constitution (Art. III) creating the judicial power, and the Judicial Code (§ 24, 28) passed in pursuance thereof, confer upon foreign corporations the right, under conditions therein specified, to *sue in,* and to *remove cases to,* the Federal Courts; and those provisions, as the "supreme law of the land" necessarily act as an implied condition or limitation upon every power of the States (Art. VI).

Nevertheless, the Arkansas statute (omitting, without indication, immaterial parts) provides as follows (R. 2):

> "If any foreign company shall *remove* any suit in this State *to* any Federal Court, or shall *institute* any suit *in* any Federal Court, it shall be the duty of the Secretary of State to forthwith revoke all authority of such company and its agents to do business in this State; and if such corporation shall thereafter continue to do business in this State" it shall pay a fine of $1,000 per day for each day it continues so to do business.

That Act is void because it undertakes to prohibit, or at least to prevent, by the imposition of an unendurable burden, the exercise of the right of resort to the Federal Courts; and as this Court said in *Herndon* v. *Chicago, etc., R. Co.,* 218 U. S. 135,

> "the right to resort to the Federal Courts is a creation of the Constitution of the United States and the statutes passed in pursuance thereof."

The Act expels a corporation from Arkansas, if it exercises a right granted by the Constitution and laws of the United States, which are "the supreme law of the land"; but which laws surely cease to be "supreme"—anything in the laws of the State to the contrary notwithstanding—if the State (a subordinate authority) can inflict a penalty upon the mere exercise of a right so granted by the "supreme" law.

We submit

I. *The Arkansas Act is void because it prohibits the exercise of a Federal right.*

A State can not tax or punish a person for exercising any right conferred by the Constitution and laws of the United States.*

*For example, a State could not imprison or fine one of its own citizens (individual or corporate) for bringing a suit in a Federal Court, nor impose a tax or fine on a person because he voted for as Congressional candidate (*Wiley* v. *Sinkler,* 179 U. S. 58), or because he gave information to the United States of a crime against its laws (*In re Quarles,* 158 U. S. 532), or because he protected a Federal judge (*In re Neagle,* 135 U. S.), or desired to travel from one State to another (*Crandall* v. *Nevada,* 6 Wall. 35), the obvious reason being that a State can not punish one for doing what one has a right to do.

The Arkansas Act is a direct punishment imposed on a foreign corporation as a penalty for exercising its constitutional right *to sue in*, or *to remove a case to*, the Federal Court, and it is therefore void.

It is no answer to say that the statute does not prohibit or prevent a suit or a removal in any *particular* case, but merely gives the company the option of abstaining from the Federal Court or getting out of the State. As well say that a statute against murder does not prohibit it, but merely gives a man the free option of committing murder or being hanged. A statute can be prohibitive and impose a penalty, without *in terms* expressly prohibiting the act penalized.

In *Western Union* v. *Frear*, 216 Fed. 199, 204 (affirmed 241 U. S. 329) it was aptly said:

> "So when the state enacts that, if the subject does something it has a perfect abstract right to do, it shall be punished, it is thereby substantially *prohibited*.
>
> The Federal Penal Code of 1909 contains very few express commands. Most of its sections provide that whoever shall do certain acts shall be punished. This is the same as enacting that these are unlawful and *prohibited*. No one would contend that these were not commands to refrain from those acts. They are *prohibitions* from a political superior to a subject, enacted for the public welfare. The state says to the telegraph company or coal company:
>
> 'You are in the state lawfully for interstate and government business. If, however, you do any other kind of business, you must have a local license. If you remove to a federal court in any case, whether in your interstate or local business, brought against you by a citizen of Wisconsin on a cause of action arising

> therein, your license to do a local business will be revoked. Any contract not in interstate commerce you may thereafter make will be void in your favor but valid against you, and any conveyance of land for local purposes which you may take will not vest title.'
>
> This is a substantial command or *prohibition. It is the same* as saying, 'You shall *not* remove such a case.' "

A few illustrations will help us to see exactly what is involved in this subject.

(*a*) Suppose a State statute read:

> "§1. No foreign corporation shall sue in, or *remove* a suit to, the Federal Court unless the amount in controversy is $10,000 or over.
>
> §2. If any foreign corporation violates §1 of this act, such corporation shall be fined $1,000 or expelled from the State, or both, in the discretion of the jury."

If a corporation wished to remove a case involving only $5,000, of course the State *could not prevent* the removal itself, for the reason that § 1 would be void because in conflict with the Act of Congress allowing removals where $3,000 is involved.

Suppose, however, that after the removal was effected, the State undertook to indict and punish the company. Could it do so? Clearly not, for § 1, prohibiting removals, being void, it is exactly as though it never had been enacted. There is, therefore, nothing on which to base the penalty, and it becomes inoperative. In short, a punishing clause dependent on a void prohibiting clause is itself void. (*Easton* v. *Iowa,* 188 U. S. 220, 228.)

(*b*) Suppose the statute (instead of having two sections, one prohibitory and the other penal) read as follows:

> If any foreign corporation shall sue in, or remove a case to, the Federal Court where the amount in controversy is less than $10,000 it shall be fined $1,000 or expelled from the State, etc.

Suppose a corporation brought a suit in the Federal Courts involving only $5,000. Could the State enforce the fine? Of course not, for there is absolutely no difference between the two examples, and in either instance, the statute would be void.

(*c*) Thus, a statute providing that:

> If a man commits forgery, he shall be imprisoned,

prohibits forgery just as much as if it read:

> No man shall commit forgery; if he does, he shall be imprisoned.*

In short, a statute may be just as prohibitory, *without saying* in so many words that something shall *not* be done, as by expressly prohibiting the thing. An act made punishable is just as much prohibited as the same act prohibited in express terms and a punishment affixed (13 Amer. & Eng. Encyc. Law, 2d Ed., 57).

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*It may be observed that generally speaking criminal statutes do not in terms forbid felonies. The almost universal form is that if a man commits such and such a crime, he shall suffer such and such a penalty (Ky. Stat. § 1148 *et seq.*); as for example (§ 1181): "If any person shall forge . . . he shall be confined in the penitentiary not less than five nor more than fifteen years."

(*d*) The Arkansas Act is, therefore, void because it *prohibits* a removal to the Federal Courts as completely as if it read:

> § 1. No foreign corporation shall remove a case to the Federal Court.
>
> § 2. If any such corporation violates § 1 hereof, the Secretary of State shall expel it.

This Court has frequently *construed* milder statutes than the one here involved, as *prohibiting* a resort to the Federal Courts, when there were *no words* of prohibition, but a mere expulsion upon such resort.

In *Harrison* v. *St. Louis & S. F. R. R. Co.*, 232 U. S. 318, an Oklahoma statute provided that if any corporation claimed, before any Court in Oklahoma, a domicile in another State, its license should be revoked. The Court unanimously held that such a statute was void because (p. 331)

> "It plainly and obviously *forbids* a resort to the Federal Courts on the ground of diversity of citizenship in the contingency contemplated, [and] punishes by extraordinary penalties any assertion of a right to remove under the laws of the United States."

In *Wisconsin* v. *Philadelphia & Reading Coal Co.*, 241 U. S. 329, a statute providing for the revocation of a corporation's license if it removed a case to theFederal Court was declared void because (p. 332):

> "Consideration of the Wisconsin statutes convinces us that they seek to *prevent* appellees and other foreign

commercial corporations doing local business *from exercising their constitutionad right to remove suits* into Federal Courts."

In the light of those cases the Arkansas statute must be construed as *forbidding* removals to the Federal Court; and, *so construed,* it is too clearly void for further argument.

II. *The Arkansas Act is void because it burdens the constitutional right of free access to the Federal Courts by the imposition of an unendurable consequence upon the exercise of that Federal right.*

One of the three great substantive Powers created by the Constitution is

"The Judicial Power of the United States"

which it is declared *"shall extend"* to all cases arising under the Constitution and laws of the United States, and to controversies between citizens of different States; and *"shall be vested"* in such inferior courts as Congress may ordain (Art. III, §§ 1, 2).

The Constitution has given to Congress the *express power* (Art. I, § 8, clause 9);

"To constitute Tribunals inferior to the Supreme Court"

and the further *express power* to make all laws necessary and proper to carry into execution the "Judicial Power" so created. Under that express grant of Power, Congress by the Judicial Code §§ 24, 28, has

prescribed the conditions under which the Burke Co. might (*a*) bring a suit in the Federal Courts so established, and (*b*) remove a case to such Federal Court.

The State of Arkansas has declared that if the Burke Co. exercises those rights, it shall be expelled from the State, and its right to do business therein (previously enjoyed without objection) shall be ended.

The Burke Co. has complied with the Congressional requirements and has exercised both of those constitutional rights, *i. e.* (*a*) to sue, and (*b*) to remove a case.

Can a State impose *any consequence whatsoever* upon a person because he has exercised his Federal Constitutional rights?

That is the great question now presented.

Any statute of a State which undertakes to hinder or deter persons from using the Federal Courts, by imposing a burden upon one who brings a suit in the Federal Court, or removes one thereto, must be held void.

1. Congress has the exclusive power to regulate the institution of suits in the Federal Courts and the removal of causes thereto. It has prescribed the conditions under which suits can be brought and removed, and the effect thereof; as, for example, that on removal "the State Court [shall] * * * proceed no further in such suit". By the Act of September 6, 1916 (Judicial Code, § 237), Congress has prescribed the conditions under which, by writ of error or *certiorari*, the decrees of State courts may be "removed" to the Supreme Court and there re-examined.

All of which is equivalent to a Congressional declaration that there shall be *no other conditions* attached to the subject, and that no State shall annex any other term (either as a conditions precedent or a conditions subsequent) to the exercise of the right of suit or removal.

The Arkansas Act affixes a condition subsequent, and says that if, and when a suit is brought in the Federal Court or is removed thereto, the company's license shall be revoked.

Although the statute does not prescribe anything to be done *before* the removal, it fixes a result *to follow thereafter;* and, in either case, it is equally void.

(*a*) Suppose a State imposed a tax of $10 upon every litigant, who by petition, writ of error or *certiorari,* "removed a case to the District Court or to the Supreme Court. Would not that be void?

Or, suppose the State provided that if a foreign company sued in the Federal Court or removed a case, it should immediately thereafter pay into the State treasury a fee of $10 or a percentage of the amount in controversy. Such statutes would not actually *prevent* a suit or a removal in any different sense than the present statute, and yet they would certainly be void as *imposing a burden* on, and obstructing the exercise of, a Federal right.

Is it not equally true that a statute declaring that if a corporation sues in, or removes a case to, the Federal Court, it shall forfeit its right to do business

in the State (thereby losing a large amount of money which it has invested in its business), has imposed a most burdensome penalty upon removals?

If a State can not impose a small monetary tax on suits or removals, how can it impose the far greater burden of destroying (by expulsion) a large business built up at great expense?

(*b*) The same section of the Constitution which gave Congress the power to create Federal Courts and to regulate the procedure thereof, also gave it the power to borrow money, to regulate the value of money, and to establish post offices. Could a State lawfully provide that any corporation which availed itself of the right to post letters at 2 cents per ounce, or to lend the value of money as defined by Congress, should thereafter be denied the right to do business in the State?

Could a State provide that if a corporation subscribed to Liberty Bonds during the war, its license should be revoked?

Of course not. Why? Because every company has the right to avail itself of any privilege offered by Congress, without being deterred therefrom through objectionable consequences imposed by a State.

In Henderson's "Position of Foreign Corporations in American Constitutional Law", the argument is stated with irresistible force (p. 141):

> "In other words, the law visiting expulsion on any corporation which petitions for removal is a *coercive boycott aimed against the jurisdiction of the United*

States Courts. And it is the proclaimed motive which makes the expulsion objectionable.

Is such a boycott constitutional?

Is there not an implied limitation, in the Constitution, that states shall not exercise granted powers in such a way as to preclude individuals from asserting privileges on whose assertion the framers of the Constitution relied to secure the proper functioning of the organs of the federal government?

There are other implied limitations of like character. The Federal government is given power to establish a bank; by implication states are forbidden to hamper the exercise of that power even by as mild an interference as a tax. The Federal government is given power to regulate commerce; by implication states may not affect such commerce with directly burdensome regulations and if those regulations are *motivated* by a desire to discriminate against interstate commerce, a prohibition is implied even though the burden be only trifling.

Is it not an implication reasonably deducible from the purposes of the Constitution that when the Federal courts were vested with jurisdiction over suits by citizens of one state against citizens of another, it was intended that no state should by fear or favor induce any citizen to impair that jurisdiction? If no such prohibition was intended, there is hardly a limit beyond which states might not go. If a corporation can be expelled because it sues in the Federal courts, it can be expelled because it appeals a case from the state courts to the United States Supreme Court. Or if it should be sued in the Federal courts, it could be expelled because it asserted a defense valid in that court, but not recognized in the state courts.

If a foreign nation were to expel an American firm because it appealed to our State Department for diplomatic protection, we would consider it a serious infringement of international rights, regardless of the orig-

inal merits of the dispute. That a member of the American Union could with impunity take such action towards the Federal government, is certainly contrary to the principles of the Constitution."

(*c*) The power of Congress over the removal of causes is quite as broad as its power to regulate commerce,* and yet it has been repeatedly held that a State can not tax, license, regulate or in any way burden the free and unrestrained flow of interstate commerce. A State cannot provide that if a corporation engages in interstate commerce such-and-such a result shall flow to which the corporation must submit.

All such State legislation has been annulled, because as Congress has the power to regulate commerce, the States have no right to enact laws which shall either abridge a person's right to engage in it or in any way impede or hinder or impose conditions or impediments thereto; in short, free commercial intercourse must not be embarrassed. Embarrassment means not only *prevention* of the commerce itself, but also the attachment of any results to its transactions not authorized by Congress.

So in *Easton* v. *Iowa*, 188 U. S. 220, it was held that as Congress had the sole power to regulate national banks, a statute of Iowa was void which provided a penalty for any banker receiving a deposit at a time when he knew the bank was insolvent.

* Indeed it is even broader, for the power to regulate commerce is partly concurrent, while the power to regulate removals is exclusively in Congress.

Applying the analogy, we see that Congress has exclusive power to regulate suits and removals. It has prescribed all the terms on the subject. A State can not add to them. It can no more say that if a corporation sues in a Federal Court or removes a case, it shall be expelled, or its license revoked, than it can say that if a corporation engages in interstate commerce it shall, *after* so engaging, pay the State a percentage of its receipts. In each case the State is fixing an effect that is to flow upon the exercise of a constitutional right, and in each case the act is void.

If the consequence imposed for suing in the Federal Court were a money fine or imprisonment of corporate officers, every one would agree that it was void. Merely varying the nature or form of the penalty does not make the statute valid.

Expulsion from the State is a far more burdensome penalty than a fine.

It may be suggested that there is some difference between a State revoking a license and imposing a fine or tax, and that the State has some greater right to revoke the former than to impose the latter.

Such a view must be promptly rejected. There is no magic about a license or the State's power to revoke it. It is simply the exercise of legislative power to change the rule of comity and expel a foreign corporation. That power is certainly no more absolute than the great power to tax or the power to punish by fine.

The true principle is that a State can not impose any

sort of punishment, fine, penalty, or result which shall flow as the necessary consequence of a person exercising a Federal right.

The foregoing argument has been based on the broad ground that as the right of removal is guaranteed by Federal law, a State can not forbid, regulate, or abridge the exercise of the right, either by prescribing conditions precedent nor by declaring what shall be the result of exercising such right; but the case may be disposed of on a narrower ground.

(*d*) Suppose that the Constitution of Arkansas had embodied *in hæc verba* Judicial Code §§ 24, 28, providing for the removal of causes; and then that the Legislature had passed an act as follows:

> "If any foreign corporation shall remove a case to the Federal Court, its license shall be revoked."

Would not such a statute be void because in direct violation of the State Constitution?

When the State Constitution gave the foreign corporation the right of removal, could the Legislature abridge that right by expelling any corporation that exercised it?

Now, the Constitution of the United States and the laws passed in pursuance thereof (including the Judicial Code) are the "supreme law of the land", and have exactly the same effect as if copied *in hæc verba* in the Arkansas Constitution. Therefore the Arkansas Legislature can not prescribe a punishment or affix a penalty for exercising such a right.

2. The decisions of this Court leave no doubt on the subject. In *Harrison* v. *St. L. and San Francisco R. R.*, 232 U. S. 318, 328, the Oklahoma "anti-removal" statute was held void because in conflict with the judicial power, the Court (WHITE, *C. J.*) saying:

> "It may not be doubted that THE JUDICIAL POWER of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, *is a power wholly independent of state action* and which therefore the several States MAY NOT BY ANY EXERTION OF AUTHORITY IN ANY FORM, DIRECTLY OR INDIRECTLY, DESTROY, ABRIDGE, LIMIT OR RENDER INEFFACIOUS.
>
> The doctrine is so elementary as to require no citation of authority to sustain it. Indeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests and the lines which define it are so broad and so obvious that, unlike some of the other powers delegated by the Constitution, where the lines of distinction are less clearly defined, the attempts to transgress or forget them have been so infrequent as to call for few occasions for their statement and application. * * *
>
> In the first place, *the right unrestrained and unpenalized by state action* on compliance with the forms required by the law of the United States to ask the removal of a cause pending in a State to a United States court *is obviously of the very essence* of the right to remove conferred by the law of the United States. * * *
>
> In the third place, as the right *freely exists* to seek removal *unchecked or unburdened* by state authority and the duty to determine the adequacy of a prayed removal is a Federal and not a state question, it follows that the States are in the nature of things *without authority to penalize or punish one who has sought to avail*

himself of the Federal right of removal on the ground that the removal asked was unauthorized or illegal. * * *

"Coming then to consider the statute from the second or latter point of view, we think it is clear that it plainly and obviously forbids a resort to the Federal Courts on the ground of diversity of citizenship in the contingency contemplated, *punishes by extraordinary penalties any assertion of a right to remove under the laws of the United States,* and attempts to divest the Federal courts of their power to determine, if issue arises on the subject, whether there is a right to remove. * * * When the nature of the statute is thus properly appreciated, nothing need be further said to manifest its obvious repugnancy to the Constitution or to demonstrate the correctness of the decree of the court below."

The same doctrine has been reaffirmed in *Missouri Pacific Ry. Co.* v. *Larrabee,* 234 U. S. 459, 471; *Phœnix Ins. Co.* v. *McMasters,* 237 U. S. 63, 71, and *Wisconsin* v. *Phil. & Reading Coal Co.,* 241 U. S. 329.

In *Missouri Pac. Ry. Co.* v. *Larrabee,* 234 U. S. 459, a Kansas statute provided that if a person took his case by writ of error from the State court to the Supreme Court of the United States and lost the case, the State court could, on the return of the case, compel the loser to pay the successful party's attorney's fee in the Supreme Court. This court held such a statute void, because, if sustained,

"the right *to freely seek access* to the Supreme Court of the United States would cease to exist, since it would be in the power of the States to *burden* that right to such a degree as to render its exercise impossible."

These authorities seem conclusive that any statute is void which prescribes that *any* particular result shall follow upon the exercise of a Federal right; and this is because a State cannot lay a burden on the exercise of such right nor in any way hamper the free access to the Federal courts.

III. *Arkansas cannot, under the guise of stipulating conditions for the admittance of foreign corporations to do business in the State, provide that a company already in, shall be expelled if it resorts (as either plaintiff or defendant) to the Federal Courts.*

The only possible argument advanced to support this Act is one* contained in the now discredited, if not overruled, cases of *Doyle* (94 U. S. 535) and *Prewitt* (202 U. S. 246), which may be summarized in the following three propositions:

(1) A State has the absolute power to prohibit (*i. e.*, exclude) a foreign corporation from entering its limits.

(2) A State may, expressly or by silent acquiescence, permit (*i. e.*, license) such corporations to enter. But it may at any time revoke such license (*i. e.*, expel the company).

* The argument referred to arose from a dictum in *Bank of Augusta* v. *Earle*, 13 Pet. 519, which in *Paul* v. *Virginia*, 8 Wall. 168, 181, was developed into the doctrine that a State might exclude a corporation from its limits or admit it "upon such terms and conditions as those States may think proper to impose. The whole matter rests in their discretion".

And so, the argument runs, having the power to revoke the license (to-wit, expel the company), the *reasons* of the State for exercising such conceded power of revocation cannot be inquired into.

The State may exercise such power arbitrarily, for a just cause or for no cause at all, for a good reason or a bad reason; and the fact that the State, instead of revoking arbitrarily, chooses to assign a bad reason for its action, cannot affect the validity of its power to act; and there can be no such thing as an unconstitutional reason for doing a thing a State has a right to do.

(3) **Therefore** the State may (*as one of the conditions of admission*) provide that if a corporation, once admitted to its limits, shall resort to the Federal Courts, a State official shall revoke its license and expel it from the State.

Founded on a faulty analogy,* each of those propositions has been found unsound in later cases, and absolutely rejected. Consequently, the *Doyle* and *Prewitt* cases are no longer even respectable authority on any point.

* A State does *not* occupy toward a foreign corporation the absolute relation of licensor to licensee. As soon as, and whenever, a State occupies *any* relation to a foreign corporation, at that very instance the Constitution and laws of the United States intervene and impose certain limitations on the State, and it no longer has the same absolute rights as a licensor has over a gratuitous licensee. In short, the relations of a State to foreign corporations are determined primarily by the Constitution and laws of the United States, and not by any supposed common law analogy between a licensor and a licensee.

Let us critically examine each of the propositions.

(1) *The power of exclusion.* A State does *not* have the absolute power of exclusion (*i. e.*, prohibiting the entrance), because it cannot exclude a foreign corporation engaged in interstate commerce or in any Federal function (*Pensacola Tel. Co.* v. *Western Union*, 96 U. S. 1; *Stockton* vs. *B. & N. Y. R. Co.*, 32 Fed. 9, 14; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, 314; *Pullman Co.* vs. *Kansas*, 216 U. S. 56, 67).

(2) *The power of expulsion.* After, as in the case at bar, a corporation has once been permitted to enter a State and do local business there, it would appear, from the later decisions, that the State no longer possesses the absolute power of expulsion (*i. e.*, revocation of license), but, *ipso facto*, becomes subject to the higher limitations of the Constitution; that a corporation then becomes a person "within its jurisdiction" protected against discriminatory legislation and entitled to the "equal protection of the laws" as well as "due process" (*Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 416; *Western Union* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56, and concurring opinions of WHITE, *J.*, at pp. 51, 69); and, consequently, that just as (*a*) Alabama had no power to tax the *local* business of the railroad differently from that of domestic railroads (*Sou. Ry.* v. *Greene*), (*b*) as Kansas could not expel the Western Union or Pullman Co. as to their *local* business only (216 U. S.), and (*c*) as Mis-

souri had no right to expel a foreign corporation because it brought suit in the Federal Court which domestic companies could have also brought (*Herndon v. Chicago, &c., R. Co.*), so (*d*) in the case at bar, Arkansas does not possess the absolute and unrestrained right to expel the Burke Company; and her motives for so doing, as expressed in her statutes, or at least the acts specified in those statutes as the occasion for the exertion of such State power of expulsion, *are the legitimate subject of inquiry to see if they are repugnant to the Federal Constitution.*

The power of the State to expel a corporation is *not* absolute, as was assumed in the earlier cases, but is subject to *some* limitations; and hence the premise (on which the *Doyle* case rested) that the *reasons* actuating a State could not be considered, is concededly unsound; and there *is* "such a thing as an unconstitutional reason for doing a thing the State has the right to do"—the opinion in the *Doyle* case to the contrary notwithstanding.

For instance, Kansas *might* have been able to prevent the Western Union from, initially, entering the State to do *local* business, but this Court held that the State *could not expel* the company as to local business, simply because the company would not submit to a void tax.

(3) *The Power to Impose Conditions.** Although, undoubtedly, the *Doyle* and *Prewitt* cases held that a State might, as the price of admission, impose the condition that if a foreign corporation asserted some Federal right (*i. e.*, to sue in or remove a case to the Federal Court) its license should be revoked; and that such a condition is not repugnant to the Constitution, yet in a few years this Court completely abandoned that doctrine.

In *Western Union* v. *Kansas, Pullman Company* v. *Kansas, Ludwig* v. *Western Union* (216 U. S.) it was held that a State could not require, as a condition of permitting a foreign corporation to do *local* business only, that the Company should abstain from asserting its Federal right of exemption from a certain tax imposed by the State. The State did not require that the Company should make any agreement in advance, but it merely gave the Company the option of waiving its constitutional exemption or ceasing to do *local* business.

* While a State may prescribe generally the terms or conditions upon which a foreign corporation (not engaged in interstate commerce, etc. *Dahnke-Walker Milling Co.* v. *Bondurant*, decided Dec. 12, 1921), will be admitted to carry on local business in the State (*Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727, 732; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, 315; *Hooper* v. *California*, 155 U. S. 648, 655; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 46; *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389, 397), this power of imposing conditions is not *absolute* as some of the cases have incautiously assumed, but it is well settled that the terms of admission must *not* be so conditioned as *to be repugnant to, or to require the surrender of any right granted under*, the Constitution (See *Prewitt* case, 202 U. S. at pp. 249, 261, and *Western Union* v. *Kansas*, 216 U. S. 1, at pp. 33-36, where prior cases are collated).

Therefore, the State's power to impose conditions being limited in this respect, the question to be settled in each case is this: Is the condition in question repugnant to the Constitution?

In holding the statute void this Court said (216 U. S. 47):

> "The right of the telegraph company to continue the transaction of local business in Kansas could not be made to depend *upon its submission to a condition prescribed by that state, which was hostile both to the letter and spirit of the Constitution.*
>
> The company was not bound, under any circumstances, *to surrender its constitutional exemption from state taxation,* direct or indirect, in respect of its interstate business and its property outside of the state, any more than it would have been bound to surrender any other right secured by the national Constitution. * * *
>
> In order to dispose of this case we need not now go further than to hold, as we do, that, for the reasons stated, the state was not entitled to the aid of the court in this case; that the affirmative relief asked by it could not have been granted without practically compelling the telegraph company, *as a condition of its doing local business in Kansas,* that it should *surrender* rights belonging to it under the Constitution of the United States, and secured by that instrument against hostile state action; *that any such condition was unconstitutional and void;* and that the right of the telegraph company to continue doing business in Kansas is not, and cannot be, affected by that condition."

And in the *Pullman Co.'s* case (216 U. S. at p. 63) the Court held that the State had attempted to compel the Company as a condition of doing local business "to waive its constitutional exemption from taxation", and that

> "the State could no more exact such a waiver than it could prescribe as a condition of the company's right to do local business in Kansas that it agree to waive the

constitutional guaranty of the equal protection of the laws, or the guaranty against being deprived of its property otherwise than by due process of law."

Those decisions destroyed the entire foundation of the *Doyle* and *Prewitt* cases, for a condition that a Company should not resort to the Federal Courts was just as hostile to the letter and spirit of the Constitution as (1) that it should not claim its constitutional exemptions from a certain tax, or (2) that it should not claim the benefit of the "due process" or "equal protection" guarantees.

In *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, as a condition of doing *local* business the State levied a tax on a railroad company which was different from that levied on domestic companies. It was held that the tax was void under the "equal protection" clause, and that the State, as a condition of permitting the Company to continue to do local business, could not require it to waive the constitutional guaranty of "equal protection of the laws".

In *Herndon* v. *Chicago, etc., Ry. Co.*, 218 U. S. 135, it was held that the general power to impose conditions of admission did not authorize the State to revoke a Company's license because it brought a suit in the Federal Court when domestic companies could bring such suits with impunity. The statute, therefore, denied to the foreign company the equal protection of the laws and was void.

In *Harrison* v. *St. L. and San Fran. R. R. Co.*, 233 U. S. 318, the Court said that neither the *Doyle* nor

Prewitt case afforded any authority for the conception

> "that it is within the power of a State in any form, directly or indirectly, to destroy or deprive of a right conferred by the Constitution and laws of the United States."

In *Phœnix Insurance Co.* v. *McMasters,* 237 U. S. 63, this Court said the State might affix such conditions of admission as it chose

> "so long as it did not impose upon the Company as a condition of doing business within the State any deprivation or rights secured to it under the Federal Constitution * * * [and] so long as no rights conferred by the Constitution and Laws of the United States were destroyed or abridged."

These several cases clearly demonstrate that a State does not have the power to impose any conditions it pleases as the price of admission; and that there are such things as "unconstitutional conditions".*

One Federal constitutional right is not more sacred or of greater value than another, so far as a State's power to infringe thereon is concerned.

If the *Doyle* and *Prewitt* cases were good law, a State could equally well say that if a foreign corpora-

*When a State is no longer allowed to get whatever price it can for the privilege of allowing a corporation to do business within its borders, this means that the privilege is no longer completely within its control. That is to say, its power of admission and exclusion is not absolute; and what the Supreme Court has really done is to abandon (without exactly saying so) the traditional doctrine that a foreign corporation can be excluded or expelled at the will of the State.

tion sued out a writ of error from this Court to review a decision of the highest court of the State, its license should be revoked. Or, it could provide for the expulsion of a foreign company if it pleaded in any State or Federal court that the State had passed a law impairing the obligation of some contract or had laid a duty on imports, or had made paper money a legal tender, or had taxed the operations of a National bank.

Will this Court decide that every foreign corporation can be compelled, as the price of doing business in a State, to refrain from ever claiming such Federal rights? Or, conversely, can each State say to all corporations of other States

> "You may come into our State but if you shall, at any time, assert in any shape any Federal right guaranteed to you by the Constitution, such as pleading in our State Court that we have deprived you of your property without due process of law or have denied you the equal protection of the laws, we will revoke your license"?

Is it the law, to use the language of the *Doyle* case, that "the State may compel a foreign company to abstain from" asserting any Federal rights "or to cease to do business in the State"?

We submit that is *not* the law. In *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 83, did not this Court so decide when it said:

> "A State *may not say* to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law."

Property taken by permission, *i. e.,* by agreement given in return as the price of admission, is *not* taken without due process. The consent itself constitutes due process. Hence, the only explanation of the language quoted is that a State can not exact as the price of admission the waiver of any Federal right.

SECOND POINT

The present status (1) of this court's decisions regarding the constitutionality of "anti-removal" statutes, and (2) of the *Doyle* and *Prewitt* cases as authority.

In 1910, in *Western Union* v. *Kansas,* 216 U. S. 1, 55, MR. JUSTICE HOLMES, in dissenting, said:

> "I am aware that the *battle has raged with varying fortunes* over this matter of unconstitutional conditions, but it appears to me ground for regret that the court so soon should *abandon* its latest decision (*Security Mutual* v. *Prewitt,* 202 U. S. 246)"

The solution of the constitutional problem will be aided by a careful study of the four successive phases of that "battle".

REVIEW OF THE AUTHORITIES.

1. *The first phase (1874-1886).*

In *Insurance Co.* v. *Morse,* 20 Wall. 445 (1874) a Wisconsin statute prohibited foreign insurance companies from doing business in the State until the com-

pany should first *sign an agreement not to remove* any suit to the Federal Court. The insurance company signed the agreement, and later attempted to remove a case to the Federal Court. The State Court refused to recognize the removal, tried the case and gave judgment for the plaintiff. On writ of error this Court decided two independent propositions:

First: That the agreement not to remove the case was void on general principles, as an attempt to oust the courts of jurisdiction conferred by law, and, therefore, afforded no contractual basis for the State Court's refusal to recognize the removal.

Second: That the statute prohibiting the company from transacting any business unless it *agreed* in advance *not to remove,* was invalid because it obstructed a right granted by the Federal Constitution; and the opinion pointed out that a State, in the exercise of its power to prescribe conditions for the admission of foreign corporations, could not impose conditions repugnant to the Constitution and laws of the United States.*

No matter what general principles are sought to be deduced from that case, it only decided (1) that an agreement not to remove a case was void, and (2) that so much of the statute as exacted such an agreement was void.

In *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535

* This is an accurate statement of exactly what was involved and decided. (See the *Morse* case reviewed in 94 U. S. 538; 121 U. S. 197-198; and 202 U. S. 250.)

(1877), another section of the same Wisconsin statute provided that if a company *removed* a case, the Secretary of State should revoke the company's license. An insurance company, having (as in the *Morse* case) agreed not to remove any cases, nevertheless removed a case to the Federal Court, and then sought to enjoin the Secretary of State from revoking its license.

This Court held that a State might impose upon a foreign corporation as a condition of admission to do business within the State, any conditions or restrictions it pleased, that are not repugnant to the Constitution or laws of the United States; that a license to a foreign corporation to enter a State did not involve a permanent right to remain there; that the power to grant a license carried with it the right to revoke it; that the State having the power to cancel the license, was the sole judge of the cases in which the cancellation should be made; that its intention or reasons for so doing could not be inquired into; that if the act done by the State is legal it is beyond the power of the Court to inquire what was the intention of those enacting the law; that the contention that the State was actuated by an "unconsitutional reason or intention" could not be considered, and that (p. 542)

> "The effect of our decision in this respect is that the State may compel the foreign company *to abstain from the Federal Courts, or to cease to do business in the State. It gives the Company the option.* This is justifiable, because the complainant has no constitutional right to do business in that State; that State has authority at any time to declare that it shall not transact

business there. This is the whole point of the case, and, without reference to the injustice, the prejudice, or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or Constitution of the United States, by its exclusion from the State, is infringed; and this is what the State now accomplishes. There is nothing, therefore, that will justify the interference of this Court."*

Justices BRADLEY, SWAYNE and MILLER dissented upon the ground that while the State might have the power absolutely to prohibit foreign corporations from entering the State, it could not impose "unconstitutional conditions" upon their doing so; that the statute was as unconstitutional as was the agreement in the *Morse* case; and that the prevailing argument that because the State might exclude a corporation without *any* cause, it could exclude it for a *bad* cause, was unsound, saying (p. 543):

> "Though a State may have the power, if it sees fit, to subject its citizens to the inconvenience of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose *unconstitutional conditions* upon their doing so.
>
> "Total prohibition may produce suffering and may manifest a spirit of unfriendliness towards sister States; but prohibition except upon conditions derogatory to the jurisdiction and sovereignty of the United States is mischievous, and productive of hostility and disloyalty to the general government.

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* This important constitutional question was decided with little or no assistance from counsel. Neither side analyzed the matters involved. The insurance company filed an 8 page Brief; while the State rested exclusively on the opinion in *Drake* v. *Doyle*, 40 Wis. 175.

"If a State is unwise enough to legislate the one, it has no constitutional power to legislate the other.

"The citizens of the United States, whether as individuals or associations, corporate or incorporate, have a constitutional right, in proper cases, to resort to the courts of the United States. Any agreement, stipulation, or State law precluding them from this right is absolutely void—just as void as would be an agreement not to resort to the State courts for redress of wrongs or defense of unjust actions; or as would be a city ordinance prohibiting an appeal to the State courts from municipal prosecutions.

"The questions arising upon these Wisconsin laws have already been considered by this court in the case of *Insurance Co.* v. *Morse*, and we held and adjudged that the agreement which the company was compelled to make, not to remove a suit into the Federal Courts, was absolutely void. **In principle this case does not differ a particle from that.** The State legislation of 1872, under which, and in obedience to which, the license of the appellees is threatened to be revoked, is just as unconstitutional and just as void as the agreement was in the former case.

"The argument used, that the greater always includes the less, and therefore, if the State may exclude the appellees without any cause, it may exclude them for a bad cause, is not sound. It is just as unsound as it would be for me to say that, because I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy, or rob my neighbor of his property. * * *

"It is said that we thus indirectly sanction what we condemn when presented directly to wit: That we enable the State of Wisconsin to enforce an agreement to abstain from the Federal Courts. This is an 'inexact

> status'. If these States can, at will, deprive them [corporations] of the right to resort to the courts of the United States, then in large portions of the country the government and laws of the United States may be nullified and rendered inoperative with regard to a large class of transactions constitutionally belonging to their jurisdiction."

It should be remembered that the Court distinctly held that the forfeiture of the right to do businesss in the State because of removing a case to the Federal Court, was *not* "a condition repugnant to the Federal Constitution", and that a State had the right to compel a foreign corporation to choose between abstaining from the Federal Court or ceasing to do business in the State. Nowhere in that opinion is there a suggestion that the decision is in any wise based upon the fact that insurance is not interstate commerce or that it is a subject over which the State has complete and exclusive control, but the broad doctrine was laid down that the *motive* actuating the State in exercising its power to revoke a license, was "not the subject of inquiry in determining the validity of a statute", and "it is quite out of the power of any Court to inquire what was the intention of those who enacted the law".

Thus the law stood from 1876 to 1886; and it seemed established that a State could lawfully provide for the expulsion of any foreign corporation which removed a case to the Federal Court.

2. The second phase (1886-1906).

But in 1886 the Court declared an exactly similar statute to be unconstitutional, adopted the reasoning of the dissenting justices in the *Doyle* case, and restored uniformity in decision with the *Morse* case.

In *Barron* v. *Burnside*, 121 U. S. 186, an Iowa statute (§ 1) required a foreign corporation, desiring to transact business in Iowa, to file a written application for a permit, the application to contain a stipulation that the permit should be subject to each of the provisions of the act. § 2 provided that any foreign corporation removing a case should forfeit its permit to do business. § 3 prescribed a penalty for transacting business without a permit.

A railroad engineer was arrested and fined for running a train when the company had no permit.

As a matter of statutory construction, the Court held the requirement that the application should contain a stipulation that the permit should be subject to each of the provisions of the act (one of which provisions was that the removal of a case to the Federal Court should forfeit the permit) was the *equivalent* of requiring (as in the *Morse* case) the company to stipulate in advance that it would not remove a case to the Federal Court; that any statute requiring such a permit or stipulation was void; and that the Company could transact its business without a permit, and the engineer was discharged on a writ of *habeas corpus*.

The Court recognized the obvious inconsistency be-

tween (*a*) its former holding in the *Doyle* case that the clause requiring an agreement not to remove was void (*Morse* case), while that the next clause, which prescribed the penalty of expulsion for violating the void clause was *good*, and (*b*) its present holding that a similarly void clause *invalidated* the provision prescribing a monetary penalty for non-compliance with such void clause; disregarded the fine distinction drawn in the *Doyle* case that there was a substantial difference between a statute requiring an agreement not to remove and one providing for a revocation of the permit if a case was removed, and held, in effect, that in either instance the statute was void, because it was an "obstruction" to a right granted under the Federal Constitution, and then disposed of the *Doyle* case in these words (p. 199):

> "The point of the decision [in *Doyle* v. *Insurance Co.*] *seems* to have been, that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it.* **All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Insurance Co.* v. *Morse*, must be regarded as not in judgment."**

In view of the contention now made that, while anti-removal statutes are concededly void as to foreign corporations engaged in interstate commerce (*Wiscon-*

*Of course the *Doyle* case held no such thing. The propriety of a Federal injunction to restrain State officers was not discussed at all. The law is well settled that such injunctions will be granted and the Court was merely seeking some ground to explain the *Doyle* case without expressly overruling it.

sin v. *Phila. & Reading Coal Co.*, 241 U. S. 329), nevertheless they are good as to those engaged solely in *domestic* commerce, such as insurance companies or the Burke Co. in the case at bar, it may be noted that the Briefs on both sides in *Barron* v. *Burnside* barely touched the questions raised in the *Doyle* case, but dealt elaborately with the State's power to exact a permit of a company engaged in *interstate* commerce. The Court declined to decide that point (121 U. S. 200), preferring to rest its decision on the broader ground, scarcely touched in argument, that every "anti-removal" provision was repugnant to the Constitution.

In *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, a Texas "anti-removal" statute, almost identical with the Iowa statute, was held void.*

In view, however, of the above quoted language used in *Barron* v. *Burnside* with respect to the *Doyle* case, nobody appreciated that the decisions in *Barron* v. *Burnside* and *Southern Pacific Co.* v. *Denton* rested upon any such narrow ground that they, by a process of refined statutory construction, were exactly like *Insurance Co.* v. *Morse*, where the Company had made an express agreement in advance not to remove the

* The language in *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100, 111, and *Blake* v. *McClung*, 172 U. S. 239, 256, indicates that the Supreme Court considered that, although the statutes involved in *Barron* v. *Burnside* and *Southern Pacific Co.* v. *Denton*, did not require an express agreement not to remove a case, yet the stipulation in the application for a permit that the permit should be subject to all the provisions of the act, was the exact *equivalent* of an express agreement not to remove cases to the Federal Court, and hence fell within the ruling of *Insurance Company* v. *Morse*. (See those cases analyzed in the *Prewitt* case, 202 U. S. at pp. 255-6.)

case; and for twenty years it was believed that the *Doyle* case had been overruled (2 Cook on Corporations(3d Ed.), 1675; Moon on Removal of Causes (1901) Secs. 30, 31; Curtis' Jurisdiction of U. S. Courts, 2d Ed. 187; TAFT, *C. J.*, in *Reimers* v. *Seatco Mfg. Co.*, 70 Fed. 573, 575; Black's Dillon on Removal of Causes, Sec. 18, note 24; *Com.* v. *East Tenn. Coal Co.* 97 Ky. 238; *Chattanooga R. Co.* v. *Evans*, 66 Fed. 809, 814). It was believed during the second phase of 20 years (1886-1906) that the anti-removal statutes were all void.

3. *The third phase* (*1906-1910*).

In *Security Mutual* v. *Prewitt*, 202 U. S. 246, the Kentucky "anti-removal" statute contained the perfectly valid requirement (*Lafayette Ins. Co.* v. *French*, 18 How. 404; *Lumberman's Insurance Co.* v. *Meyer*, 197 U. S. 407) that before a license should be granted to a foreign insurance company, it must file a resolution of its directors consenting to the service of process on its agents and the Insurance Commissioner.

It did not require the company to sign an agreement in advance not to remove its suits (as in the *Morse* and *Doyle* cases), nor did it contain any provision that the application for a license should stipulate that it should be subject to the other provisions of the statute (as in *Barron* v. *Burnside* and *Southern Pacific Co.* v. *Denton*).

It merely provided that if any company removed a suit to the Federal Court, the Insurance Commissioner should forthwith revoke its license and prescribed a

fine for the transaction of any business after a revocation of the license.

The Security Mutual removed a case to the Federal Court; the Insurance Commissioner revoked the company's license for the sole reason of such removal. The Security Mutual brought suit in a State Court to compel the Insurance Commissioner to cancel his revocation and to restore the Security Mutual's license.

As there had been no requirement that the company should in any way agree in advance not to remove its cases to the Federal Court, the single question presented was whether a State statute was valid which required the expulsion of a foreign corporation for exercising its constitutional right to remove a case to the Federal Courts.

Upon a careful review of all the cases it was held that the basis of the decisions in the *Morse* case, *Barron* v. *Burnside,* and *Southern Pacific Co.* v. *Denton,* was that in each case the statute *exacted an agreement in advance* not to remove a case; and that such being the fact, not only was the specific section requiring such agreement void, but also the other sections of the act, such as the one with respect to service of process (*Denton* case) and the one prescribing a fine for transacting business without a license (*Barron* v. *Burnside*) were likewise void.*

* That attempted differentiation between the *Doyle* case and *Barron* v. *Burnside* has been subjected to severe criticism. In Henderson's "The Position of Foreign Corporations in American Constitutional Law" (1918) it is said (p. 137):

"*Barron* v. *Burnside* was by the majority distinguished on the ground that there the penalty was for refusing to

The Court did not, however, attempt to explain why the void provisions in the *Denton* case and *Barron* v. *Burnside* were sufficient to invalidate the *other* provisions of those acts, and yet did not have a similar effect in the *Doyle* case; or conversely, if the void provision in the *Doyle* case was *not* sufficient to invalidate the section compelling a revocation of the license, why did a similar void provision render illegal the revocation sections of the act in the *Denton* case, and *Barron* v. *Burnside*.

The Court simply ignored the inconsistency between

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agree not to remove to the federal courts, not for actually removing. The distinction is an astonishing one. The indictment in *Barron* v. *Burnside* was not for failure to file the agreement. The agent who was indicted was under no statutory duty to file it. The indictment was for doing business on behalf of a corporation which had failed to comply with a condition imposed by the state. If the distinction, then, is to have any meaning, it must go to the extent of preventing a state from expelling a corporation for failing to file such a stipulation. For if the decree of expulsion were valid surely it could be made effective by criminal prosecution against an agent who helped the corporation to violate it. A federal district court has so interpreted the distinction, and has enjoined the state officials from revoking the license of a foreign corporation which failed to stipulate that it would not resort to the federal courts. The result is then that a state cannot compel a foreign corporation to file an entirely harmless and nugatory stipulation, a stipulation which is impotent to oust the federal courts of jurisdiction, but it may with impunity expel a corporation which actually invokes their jurisdiction. Is not this straining at a gnat and swallowing a camel? It seems impossible that both *Barron* v. *Burnside* and the *Prewitt* case should stand.

Recent decisions indicate that it is the *Prewitt* case which must yield, and that the court is once more returning to the doctrine of *Barron* v. *Burnside*."

The fact is that in *Barron* v. *Burnside* and *Southern Pacific* v. *Denton*, this Court disregarded the fine distinction drawn in

those holdings, and, after quoting the following language from *Barron* v. *Burnside*, which had generally been considered as overruling the *Doyle* case, to wit:

> "The point of the decision [*Doyle* case] seems to have been, that, as the State had granted the license, its officers would not be restrained by injunction, by a Court of the United States, from withdrawing it. *All that there is in the case beyond this*, and all that is said in the opinion which appears to be in conflict with the adjudication in *Insurance Co.* v. *Morse*, must be regarded *as not in judgment*" (121 U. S. 199),

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the *Doyle* case and reverted to the principles laid down in the *Morse* case; and, after quoting the statutes verbatim, this Court, in the argumentative part of its opinions, simply referred to the Iowa and Texas statutes respectively as requiring a "stipulation not to remove" (121 U. S. 197) and "to surrender a right and privilege" (146 U. S. 207); but it was only referring to the *substantial effect* of the statutes, and not attempting to quote their terms *literally*.

When this Court spoke of a statute as requiring "a surrender of a privilege", it did not mean an express agreement in advance not to remove, but only referred to the *substantial effect* of the statute in making the right to do business dependent upon abstaining from the Federal Courts, which is of course a surrender of a right as effectually as if it had expressly agreed in advance not to remove.

This Court had referred to every one of the various State statutes as requiring the foreign corporation *to stipulate not to remove* cases to the Federal Court; but no distinction was drawn between those statutes which required foreign corporations to sign an agreement that they would not remove cases, and those statutes which merely provide that *if* a foreign corporation removed a case, its right to do business shall be revoked. It held that in whichever form the statute was drafted, it was equivalent to requiring the foreign corporation to stipulate not to remove a case to the Federal Court.

This explains the Court's general remarks that a statute was void because it required a stipulation not to remove—whereas, strictly speaking, as to form only the statute may have said that if a case was removed the license should be revoked.

Mr. Justice PECKHAM proceeded (p. 254):

> "This is the language which it is contended overrules the *Doyle* case. We do not think so. A reference to the *Doyle* case will show that the first part of the above quoted statement is inaccurate, as the case does *not* seem to have been decided upon the proposition that an injunction was improper from a Court of the United States, to State officers. The *Morse* case was referred to and approved, and the Court held there was nothing inconsistent between the two cases. The *Doyle* opinion proceeds upon that theory.
>
> If it had been the intention of the Court in *Barron* v. *Burnside* to overrule the *Doyle* case, it was easy to have said so. Instead of that, the opinion rests upon the ground of the agreement to be exacted as a condition of granting the permit, and that the statute was not separable into parts, and it was held that the requirement of such a stipulation was void."

The Court failed to explain how or why the statute involved in the *Doyle* case was separable, so that one part could fall and the other stand, while the similar statutes in *Barron* v. *Burnside* and *Southern Pacific* v. *Denton* were deemed inseparable, and the whole statute condemned because of the one invalid provision.

Having in this extremely unsatisfactory way decided that there was nothing inconsistent between the *Morse* case, *Barron* v. *Burnside*, and *Southern Pacific* v. *Denton*, on the one hand, and the *Doyle* case upon the other, the Court held the Kentucky "anti-removal" statute valid, and gave its reason in the following language (p. 257):

> "It has not been decided that a statute which has *no* requirement for a stipulation or agreement not to re-

move is void, if there be simply a provision therein for a *revocation* of the permit, such as is contained in the statute under review.

As a State has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial."

And after quoting a concession from the argument of counsel (a concession which is not made in the case at bar), Justice PECKHAM continued,

"Thus it is admitted that a State has power to prevent a company from coming into its domain, and that it has power to take away its right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives; but what the companies deny is the right of a State to enact in advance that if a company remove a case to a Federal Court, its license shall be revoked.

We think this distinction is not well founded. The truth is that the effect of the statute is simply to place foreign insurance companies upon a par with domestic ones doing business in Kentucky. No stipulation or agreement being required as a condition for coming into the State and obtaining a permit to do business therein, the mere enactment of a statute which, in substance, says if you choose to exercise your right to remove a case into a Federal Court, your right to further do business within the State shall cease and your permit shall be withdrawn, is not open to any constitutional objection. The reasoning in the *Doyle* case we think is good."

Mr. Justice DAY (with whom HARLAN, *J.*, concurred) dissented in an opinion reviewing all the prior

decisions and their vacillations in reasoning. Mr. Justice WHITE did not dissent, but there is reason to believe that his views were also with the minority.

The difference between the prevailing and dissenting opinions was reduced to the following narrow question: Is a requirement that a foreign corporation shall in fact abstain (as distinguished from agreeing in advance to abstain) from exercising a Federal right as the price of transacting business within a State, repugnant to the Federal Constitution?

The majority opinion said there was no repugnancy. The dissenting opinion said there was.

Mr. Justice DAY said (202 U. S. 259):

> "As a general proposition it is undoubtedly true that a State may prevent foreign corporations, at least those not engaged in interstate commerce, from doing business within its borders and may impose restrictions upon the right to transact local business as it may see fit. But this right in our opinion *is not without limitation.* It is the established doctrine of this court that a restriction of this power is found in the denial of the right to a State to impose a condition in direct conflict with the Constitution of the United States, in requiring a corporation, as a sole condition of doing business within the State, to surrender the right of removal created and enforced by the Federal Constitution and laws in advance, or give it up after its admission to do business in the State."
>
> [Then follows an acute analysis of all the prior authorities.]
>
> "The doctrine that the surrender of rights granted or secured by the Constitution of the United States may be made a condition of the privilege of doing or continuing business within a State is at war with that instrument, and if adopted or sanctioned by all of the States would

nullify the supreme law of the land in some of its most essential provisions. * * *

The principles announced in *Doyle* v. *Ins. Co.* and *Barron* v. *Burnside* are *directly opposed* the one to the other, and *cannot both prevail.* The former case was decided upon the principle that as the State has the full right to exclude a foreign corporation it may do so for any reason or for no reason. The latter case qualified this doctrine with the limitation that the exclusion may not be solely because the corporation was exercising or would not yield the right to avail itself of a privilege created and protected by the Federal Constitution.

After such repeated affirmance and general acceptance, we do not think the doctrine announced in *Barron* v. *Burnside* ought to be qualified or detracted from, and certainly it sems to us that the court should not return to the *rejected* doctrine of the *Doyle* case.

If a State may lawfully withhold the right of transacting business within its borders or exclude foreign corporations from the State upon the condition that they shall surrender a constitutional right given in the privilege of the companies to appeal to the courts of the United States, there is nothing to prevent the State from applying the same doctrine to any other constitutional right, which, though differing in character, has no higher or better protection in the Constitution than the one under consideration.

If the State may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all.

In pursuance of the principle announced in this case, that the right of the State to exclude, includes the right, when exercised for any reason or for no reason, the State may say to the former corporation,—You may do business within this State, provided you will yield all right to be protected against deprivation of property without due process of law; or provided you surrender

your right to have compensation for your property when taken for private use, or provided you surrender all right to the equal protection of laws; and so on through the category of rights secured by the Constitution and deemed essential to the protection of people and corporations living under our institutions. This dangerous doctrine, asserted in the majority opinion in the *Doyle* case, destroyed and overthrown as we think in *Barron* v. *Burnside*, which latter case has been consistently and repeatedly followed in this court and in other courts, Federal and State, from that day to this, ought not now to be rehabilitated, and restored to its power to work destruction of rights deemed so essential to the safety of citizens, natural and artificial, that they have been secured by the provisions of the Federal Constitution.

In the opinion of the court in this case the doctrine that a corporation cannot be permitted to be deprived of its right to do business because of the assertion of a Federal right is said not to be denied, because the right of a foreign corporation to do business in a State is not secured or guaranteed by the Federal Constitution. Conceding the soundness of this general proposition, *it by no means follows that a foreign corporation may be excluded solely because it exercises a right secured by the Federal Constitution.* For, conceding the right of a State to exclude foreign corporations, we must not overlook the limitation upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution. If this were otherwise, the State would be permitted to destroy a right created and protected by the Federal Constitution under the guise of exercising a privilege belonging to the State, and, as we have pointed out, the State might thus deprive every foreign corporation of the right to do business within its borders, except upon the condition that it strip itself of the protection given it by the Federal Constitution.

Furthermore, it is stated in the prevailing opinion that while the State may exclude in advance or deprive a foreign corporation of the privilege of doing business after it is lawfully in the State, because of the exercise of a Federal right, it cannot require the corporation to agree in advance that it will waive such right, as that, it is admitted, would be unconstitutional.

We think the distinction is without a substantial difference and makes the validity of the act turn upon the means of attaining the same unlawful end. In either alternative the corporation is excluded from the State because it will not consent to surrender the right given it under the Federal Constitution.

While we concede the right of a State to exclude foreign corporations from doing business within its borders for reasons not destructive of Federal rights, we deny that the right can be made to depend upon the surrender of the protection of the Federal Constitution, which secures to alien citizens the right to resort to the courts of the United States.

In the cases decided in this court subsequently to *Barron* v. *Burnside*, while the general proposition is affirmed that a State may prescribe conditions upon which a foreign corporation may do business within its borders, in no one of them is it asserted that the State may exclude or expel such corporations because they insist upon the exercise of a right created by the Federal Constitution. On the contrary, this court has repeatedly said that such right of exclusion was qualified by the superior right of all citizens to enjoy the protection of the Federal Constitution. The Federal authority gives no right to deny to the citizens of a State access to the local courts of a State. For wise purposes the Federal Constitution has provided courts for citizens of different States, believed to be free from local influence and prejudice, and laws have been passed by Congress to make the privilege of resort to them effectual. In our view no State enact-

ment can lawfully abridge this right or destroy it, directly or indirectly, by affixing heavy penalties to its assertion by those lawfully entitled to its enjoyment. We think *Barron* v. *Burnside* was intended to overrule the contrary declaration which is found only in the *Doyle* case, which is inconsistent with or opposed to every other declaration directly upon the subject in the opinions of this court.

We are of the opinion that the statute in question, so far as it authorizes the cancellation of a license given by a State to a corporation to do business within its limits, whenever such corporation, in the exercise of a constitutional right, has a suit brought against it in a state court removed to the Federal court for trial, is unconstitutional and void."

Thus, the third phase of the constitutional battle, which had ebbed and flowed with such varying fortunes for more than 30 years, ended with the decision of the *Prewitt* case.

It was apparently settled that, although a State could not as a condition of admission require a foreign corporation affirmatively *to agree,* in advance, to surrender a Federal right nor enforce such agreement if made,—because such a condition would be repugnant to the Constitution—nevertheless it could accomplish exactly the same end by prescribing that if a foreign corporation should in fact exercise any right guaranteed it under the Federal Constitution, it must leave the State.*

*This is not too extreme a statement of the effect of the *Prewitt* case. The right to the equal protection of the laws, to "due process of law", to trial by jury, or to compensation for private property taken for public use, is no more sacred than the right to resort to Federal Courts (per Mr. Justice DAY, 202 U. S. 267).

In other words, the constitutional doctrine was established that a State, under its power to admit or exclude at will a foreign corporation, could exact as a condition of admission to do *local* business, any price it saw fit to charge, *i. e.*, a tax (as high as it pleased to impose), the abstention from exercising Federal rights, or any other requirement.

But this doctrine had but a short life—less than four years—before it was destroyed in the next phase of the battle now to be noticed.

4. *The fourth phase* (*1910-1916*).

The fourth phase of the constitutional battle began in 1910 with the consideration of a series of taxing statutes.

In case after case, this Court has been forced to recede from the *Doyle* and *Prewitt* cases.

I. *The Missouri tax cases.* In *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, a statute provided that before a foreign corporation should be admitted to do any purely *local* business in Kansas, it must pay a fee of a small percentage upon its authorized capital stock. The Western Union refused to pay the fee, and the State obtained a decree below enjoining it from doing any local business.

This Court was unanimously of the opinion that the fee being based upon the total capital stock was invalid *as a tax*, because (1) a burden on interstate commerce, and (2) a tax on property beyond the limits of the State; and by a *five to four* vote held the statute void *as a condition of admission* to do *local* business.

While, as presented in the ORAL ARGUMENTS and BRIEFS of counsel, there was seemingly no connection between this tax case and the questions fought out in *Barron* v. *Burnside* and the *Prewitt* case, yet it is interesting to note that the majority of Court of its own motion took this opportunity, as the first of a series of occasions, to reconsider the whole subject; and that while half of the majority opinion (by HARLAN, *J.*, who dissented in the *Prewitt* case) is taken up with a refutation of what might be presumed to be the contentions of the State, it is in reality disposing of the arguments advanced in the consultation room by his dissenting colleagues,—arguments never even suggested by the State's counsel. And when the Court uses the formulæ "it is said" in stating objections which it then overrules, it is disposing, not of the claims of counsel, for they did not advance them, but of the contentions of those justices who still adhered to the principles of the *Prewitt* case.

The minority of the Court contended that (conceding its invalidity as a tax) the State did not attempt to *tax* the company nor to enforce payment of any *tax*, but merely made the payment of the fee a condition of admission to do *local* business; that the company was given the option to pay it or to abstain from doing a local business in Kansas; as it declined to pay the fee, it could not be permitted to do local business; and that a State may prescribe the *terms* on which a foreign company, whatever the nature of its business, may enter and do *local* business within its limits, citing the *Prewitt* case as conclusive.

In response to that argument, the Court, by Mr. Justice HARLAN, relied on *Barron* v. *Burnside, Southern Pacific* v. *Denton* and allied cases, ignored the reasoning of the *Prewitt* case, and held that it was not in point, because it did not relate to *interstate* commerce, saying (p. 45):

> "The vital difference between the *Prewitt* case and the one now before us is that the business of the insurance company, involved in the former case, was not, as this court has often adjudged, interstate commerce, while the business of the Telegraph Company was primarily and mainly that of interstate commerce. * * * The court did not intend by its judgment in the *Prewitt* case to recognize the right of Kentucky, by any regulation as to foreign insurance companies, to burden interstate commerce or to tax property located and used without its limits * * * the State was not entitled to the aid of the court in this case; that the affirmative relief asked by it could not have been granted without practically compelling the Telegraph Company as a condition of its doing *local* business in Kansas that it should surrender rights belonging to it under the Constitution of the United States and secured by that instrument against hostile state action; that any such condition was unconstitutional and void; and that the right of the Telegraph Company to continue doing business in Kansas is not and cannot be affected by that condition."*

*The opinion attempted to preserve an appearance of consistency by saying the *Prewitt* case recognized that the conditions of admission must not violate the Federal Constitution. But that merely "begged the question" as the real issue was whether the penalty of expulsion for removing a case was repugnant to the Constitution. Of course all the cases have stated the general principle that a State cannot prescribe any condition that violates the Federal Constitution; but the difficulty which has arisen is in determining whether the particular condition or prohibition violates the Federal Constitution.

The attempted differentiation was tantamount to a confession of the erroneous basis on which the *Prewitt* case rested, (*a*) because obviously the fee was no more a burden on interstate commerce or a tax on property outside the State, than the condition against removal was a burden upon the equally constitutional right freely to resort to the Federal Courts, (*b*) because Kansas had as complete control over the *local* telegraph business (which was all that was affected) as Kentucky had over insurance, (*c*) because if Kentucky could make it optional for an insurance company to refrain from exercising a Federal right or be expelled from the State, why could not Kansas make it optional for a telegraph company to pay a fee burdensome to its interstate commerce or be expelled from its local business, and (*d*) because the insurance company equally with the telegraph company was compelled "as a condition of its doing local business in Kansas [Kentucky] [to] surrender rights belonging to it under the Constitution of the United States" (p. 48).

Mr. Justice WHITE concurred with the majority but also gave the additional ground, that as the State had permitted the Telegraph Company to come in, to acquire property and to expend large sums of money in building up its local and interstate business, it could not then arbitrarily expel the corporation and thus confiscate the investment of a company *already in*, upon the fictitious theory that the corporation was *not in the*

State and was refusing to comply with a condition for its admittance. He thus described his own view (p. 51):

> "It simply prevents the State from driving out the corporation which is in the State by imposing upon it arbitrary and unconstitutional conditions, when upon no possible theory could the right to exact them exist, except upon the assumption that the corporation is not in the State, and that the illegal exactions are the price of the privilege of allowing it to come in."

It is again interesting to note that when (p. 49) WHITE, *J.*, stated the opposing "reasoning" and "argument" which he proceeded to refute, he was not stating (as one might infer) any contentions advanced by counsel, but those advanced solely by the four dissenting justices, all of whom had concurred in the *Prewitt* case.

The strong dissent of Mr. Justice HOLMES (concurred in by FULLER, *C. J.*, PECKAM and MCKENNA *JJ.*) only served to emphasize the repudiation of the *Prewitt* case. He conceded that the fee was void as a *tax*, but insisted that the power of Kansas over *local* business was as complete as it was over insurance, and that Kansas merely said to the company that if it wanted to do a local business it must pay a certain fee, in default of which payment, Kansas sought only to oust it from that part of its business in which the company had no right to engage unless the State gave leave. He said (p. 54):

> "What I have said shows, I think, the fallacy involved in talking about unconstitutional conditions. Of

course, if the condition was the making of a contract contrary to the policy of the Constitution of the United States, the contract would be void. That was all that was decided in *Southern Pacific Co.* v. *Denton,* 146 U. S. 202. But it does not follow that, if keeping the contract was made a condition of staying in the State, the condition would be void. I confess my inability to understand how a condition can be unconstitutional when attached to a matter over which a State has absolute arbitrary power. * * *

If after this decision the State of Kansas, without giving any reason, sees fit simply to prohibit the Western Union Telegraph Co. from doing any more local business there, or from doing local business until it has paid $20,100, I shall be curious to see upon what ground that legislation will be assailed.

I am aware that the battle has raged with varying fortunes over this matter of unconstitutional conditions, but it appears to me ground for regret that the Court so soon should *abandon* its latest decision *Security Mutual Life Ins. Co.* v. *Prewitt,* 202 U. S. 246."

In *Pullman Co.* v. *Kansas,* 216 U. S. 56, the same statute was held void, as applied to the Pullman Co., upon the ground that Kansas could not compel the Pullman Co. in order that it might do *local* business in Kansas, to waive its constitutional exemption from State taxation on its interstate business; and (almost quoting the *dissent* in the *Prewitt* case) the Court held (p. 63):

"that the State could no more exact such a waiver than it could prescribe as a condition of the company's right to do local business in Kansas that it agree to waive

> the constitutional guaranty of the equal protection of the laws, or the guaranty against being deprived of its property otherwise than by due process of law."

That is obviously inconsistent with the *Prewitt* case, where it was held that a statute which said "if you choose to exercise your right to remove a case into a Federal Court, your right to further do business within the State shall cease and your permit shall be withdrawn, is not open to any constitutional objection" (202 U. S. 257-8).

In a lengthy concurring opinion, Mr. Justice WHITE, recognizing the conflict between (1) the conclusions reached in the *Western Union* and *Pullman* cases, and (2) the *Prewitt* case's doctrine that a State might exclude a corporation for a good reason, a bad reason, or none at all, endeavored to minimize the conflict by the development of what he termed the doctrine of "absolute and relative power". He argued that where a State had the *absolute power* to exclude a corporation from its limits, (as in the case of insurance or other purely intrastate or non-commercial business), it might affix to the privilege of admission, such conditions as it deemed proper, and that the validity of the condition was immaterial and not open to question; but that where the power of the State to exclude was *not* absolute, but only *relative*, as for example, a corporation doing both a local and also an interstate or government business, the power of the State to impose conditions with respect to the transaction of local business was no longer unrestrained, and those

conditions were subject to inquiry, and if they involved the surrender of a constitutional right, the action of the State was unlawful.*

Mr. Justice WHITE revealed the fact (p. 74) that in the *Prewitt* case he had yielded his individual opinion, because he thought it his duty to follow the *Doyle* case; but when the application of that doctrine would have given the State the power to exclude a Telegraph Company or a Sleeping Car Company from *local* business unless it consented to a tax upon its interstate business, he sought to find a way out of the difficulty, and he found the road in his novel doctrine of "absolute and relative power".

Without stopping to examine whether that doctrine would really reconcile the prior cases, it is sufficient to observe that from the standpoint of constitutional law, there is no more reason to protect a Telegraph Company from a tax upon its interstate business as a condition of doing local business, than there is to protect an insurance or road-construction company from an enforced surrender of its constitutional right of removal, as a condition of transacting its local business within a State.

Mr. Justice HOLMES, in a dissenting opinion, pointed out the defect in Mr. Justice WHITE's theory in the following short comment (p. 75):

> "I do not see how or why the right of a State to exclude a corporation from internal traffic is complicated

*This doctrine of "absolute" and "relative" power is acutely analyzed and criticized as fallacious in Henderson, *op. cit*, pp. 129-131.

or affected in any way by the fact that the corporation has a right to come in for another purpose. It is said that in such a case the power of the State is only relative, and in the sense that it is confined to the local business, I agree. But in the sense that it is not absolute over that local business the statement seems to me merely to beg the question that is to be discussed. I do not understand why the power is less absolute over that because it does not extend to something else.

So again the proposition that a State may not subject all corporations that enter the State for commerce with other States to such conditions as it sees fit to impose upon local business, no matter how offensive the terms, seems to me a proposition not to be assumed but to be proved; or again that the arbitrary prohibition of local business is a burden on commerce among the States. I am quite unable to believe that an otherwise lawful exclusion from doing business within a State becomes an unlawful or unconstitutional burden on commerce among States because if it were let in it would help to pay the bills. Such an exclusion is not a burden on the foreign commerce at all, it simply is the denial of a collateral benefit. If foreign commerce does not pay its way by itself I see no right to demand an entrance for domestic business to help it out."

He had previously expressed the same idea in his dissent in the *Western Union* case in these words (216 U. S. 52):

"If the corporation has the right to enter for one purpose, and the State has the right to exclude its entry for another, the two rights can co-exist. * * * What comes in only for a special purpose can claim constitutional protection only in its use for that purpose and for nothing else."

The next step in discrediting the *Prewitt* case is interesting because the very Arkansas "anti-removal" Act involved in the case at bar was declared void by the District Court (Sup. Rec. 14, 156 Fed. 152); but, on appeal, this Court, while affirming the decree, did not specifically pass upon the "anti-removal" section, but, in *Ludwig* v. *Western Union*, 216 U. S. 146, it was held that the payment of the tax was a condition upon which the Telegraph Company should be permitted to do local business; that as the tax was imposed upon its entire capital stock, it was in effect a tax upon interstate commerce, and fell within the decision in the *Western Union* and *Pullman* cases, and was therefore void. In the case at bar, the interstate feature is not involved, and hence the Court must decide whether Arkansas can make the right to do local business dependent upon the continued abstention from the enjoyment of Federal rights.*

The *Western Union, Pullman, Ludwig* and *Greene* cases—all reported in 216 U. S. and decided within a

*In *Southern Railway Co.* v. *Greene*, 216 U. S. 400, an Alabama statute (avoiding the defect of the interstate burden in the Kansas and Arkansas statutes) provided that each foreign corporation should pay a tax based upon the amount of its capital stock employed within the State, as a condition of doing local business, but no similar tax was required of domestic corporations doing the same business. The Southern Railway had *previously* entered Alabama and acquired property there. It was held that the tax was discriminatory and in violation of the "equal protection" clause of the Fourteenth Amendment; and, that, under the rulings in the *Western Union* and *Pullman* cases, such an unconstitutional condition of submitting to a denial of the "equal protection of the laws" could not be exacted for the privilege of continuing to do a domestic business within the State.

few weeks of each other—established (1) that a State could not, as a condition of admission to do *local* business, require a foreign corporation to pay a fee or tax which could not be constitutionally imposed upon it because constituting either a burden on interstate commerce or a denial of the "equal protection" of the laws; and (2) that there were such things as "unconstitutional conditions".

Without attempting to determine what after these decisions was left of the *Prewitt* case, it is certain that any corporation engaged in *interstate* commerce, is entitled to transact local business without being compelled to submit to any exaction for that privilege, where the exaction is not *per se* lawful; that is to say, a State cannot, under the guise of granting to an interstate corporation the privilege of doing *local* business, compel it to submit to any condition which could not be imposed upon it as a direct piece of legislation.

Therefore, so much, at least, of the *Doyle* and *Prewitt* cases was absolutely destroyed as held that a State could compel a foreign corporation to choose whether it would abstain from doing local business in the State or submit to the State's requirements. Some limitations *were* imposed on the supposedly plenary power of the State over the conditions of admission therein; and it is difficult to see how the submission to an unconstitutional tax is, constitutionally, a more offensive exaction than having to surrender the right freely to resort to the Federal Courts.

II. *The "anti-removal" cases.* In *Herndon* v. *Chic., Rock Island & Pac. Ry. Co.,* 218 U. S. 135, the Missouri "anti-removal" statute (which, passed after the *Prewitt* decision and modeled on the Kentucky Act, contained none of the objectionable features of the statutes involved in the *Morse* case and *Barron* v. *Burnside*), simply provided for the revocation of the license of any foreign corporation that removed a suit to, or instituted one in, a Federal Court.

The railroad *brought suit* in the Federal Court to test another statute, and to enjoin the Secretary of State from revoking its license to do business in Missouri.

The Court stated that the constitutional question involved was,

> "Can the license and right of the complainant to do business in the State of Missouri be lawfully revoked because it has begun a suit, or may remove a suit, from a State Court to a Federal Court, complainant being a corporation organized in another State?"

In an opinion by Mr. Justice DAY (who had dissented in the *Prewitt* case), the Missouri anti-removal statute was held "unconstitutional and void" with the following brief comment (p. 158):

> "As to the validity of the act of March 13, 1907, forfeiting the right of the company to do business in the State of Missouri, and subjecting it to penalties in case it should bring a suit in the Federal courts, or remove one from the State courts to the Federal courts, but little

need be said. This is so because of the cases decided at this term involving contentions kindred to the one made in this case. See *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union Tel. Co.*, 216 U. S. 146; *Southern Railway Co.* v. *Greene*, 216 U. S. 400.

* * * The corporation was within the State, complying with its laws, and had acquired, under the sanction of the State, a large amount of property within its borders, and thus had become a person within the State within the meaning of the Constitution, and entitled to its protection. Under the Statute in controversy a domestic railroad company might bring an action in the Federal court, or in a proper case remove one thereto, without being subject to the forfeiture of its right to do business, or to the imposition of penalties provided for in the act. In all the cases in this court, discussing the right of the States to exclude foreign corporations, and to prevent them from removing cases to the Federal courts, it has been conceded that while the right to do *local* business within the State may not have been derived from the Federal Constitution, the right to resort to the Federal courts is a creation of the Constitution of the United States and the statutes passed in pursuance thereof."

It is important to notice that the Court seems to rest its decision wholly upon the fact that while a domestic railroad company might sue in the Federal Court or remove a case, without forfeiting its right to do business, a foreign corporation would forfeit its license, which, of course, indicates an additional reason (*Southern Ry. Co.* v. *Greene*) why the Arkansas "anti-removal" statute is unconstitutional in that it denies to

a foreign corporation the "equal protection" of the laws, viz: an Arkansas company can sue in, or remove to, the Federal Court without suffering a penalty, while a foreign company doing exactly the same kind of business suffers the penalty; and no person is required to submit to that wrong as the price of doing business in the State. The decision was not based at all on the fact that the railroad was engaged in interstate commerce.

In *Harrison* v. *St. L. & San Francisco R. R. Co.*, 232 U. S. 318, a most ingenious Oklahoma statute was involved, which did not on its face purport to be an "anti-removal" statute. It artfully provided that if any person or corporation doing business in Oklahoma should claim before any Court in Oklahoma (apparently State or Federal Court) domicile in another State, the Judge of the Court should report it to the Secretary of State, who must immediately revoke its license, and a penalty was imposed for doing business after the revocation of the license.

The Railroad Co. removed a case to the Federal Court, its license was thereupon revoked, and it brought suit to enjoin the Secretary of State from enforcing the revocation or interfering with its local business.

Chief Justice White, now delivering the unanimous opinion of the Court, abandoned the old arguments of the *Doyle* and *Prewitt* cases that such statutes did not *forbid* removals but merely left it optional with the company voluntarily to abstain from the Federal

Courts or retire from the State, and he boldly and correctly declared that such a statute (p. 331):

> "plainly and obviously *forbids** a resort to the Federal Courts on the ground of diversity of citizenship in the contingency contemplated, [and] punishes by extraordinary penalties any assertion of a right to remove under the laws of the United States * * *";

and he completed the frank recognition that "anti-removal" statutes do not merely offer options of conduct to the company, but are in their very nature *prohibitions* upon the exercise of a Federal right, saying (p. 331):

> "When the nature of the statute is thus properly appreciated, nothing need be further said to manifest its obvious repugnancy to the Constitution."

Only a few weeks ago the true nature of such statutes was again emphasized when in *Crescent Oil Co.* v. *Mississippi* (decided Nov. 14, 1921) this Court said:

> *"Harrison* v. *St. Louis & San Francisco R. Co., 232* U. S. 318 was an attempt on the part of a State to *prevent* removal of causes from State to United States Courts * * *"

It took this Court a long time to admit that the *true nature* of such statutes was to *forbid* a resort to the Federal Courts; but in view of the construction given

*This precise argument was unsuccessfully made by counsel in the *Prewitt* case (see MR. BULLITT's Brief, pp. 27-31 in the *Prewitt* case) and was not adopted by this Court, which then later adopted it almost *verbatim* in the *Harrison* case.

to the Oklahoma statute, it must give a similar construction to the more open, frank, but no less vicious Arkansas "anti-removal" statute now under attack.

In the *Harrison* case, the Court adopted the argument unsuccessfully urged by counsel in the *Prewitt* case (see MR. BULLITT'S Brief, pp. 19-36, 79) and for the first time approached the problem from the standpoint of the supremacy of the judicial power of the United States, which was declared to be (p. 328)

> "a power wholly independent of state action and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious. * * * the right unrestrained and unpenalized by State action on compliance with the forms required by the law of the United States to ask the removal of a cause pending in a State to a United States Court is obviously of the very essence of the right to remove conferred by the law of the United States * * * as the right freely exists to seek removal unchecked or unburdened by State authority * * * the States are in the nature of things without authority to penalize or punish one who has sought to avail himself of the Federal right of removal * * *"

In response to the contention that the *Doyle* and *Prewitt* cases were controlling, the CHIEF JUSTICE, reverting to the ground of his concurring opinion in *Pullman Co.* v. *Kansas*, said that they involved legislation as to insurance over which there was complete State authority, and hence had no application to a situation where the power of a State was relative and

not absolute. But he went further, and, citing the *Herndon* case, said (p. 333):

> "The ground of the decision in the last case shows the extremely narrow scope of the rulings in the *Doyle* and *Prewitt* cases, and render their inapplicability to this case certain. Indeed, the ruling in the *Herndon Case* and in those subsequent to the *Doyle* and *Prewitt* cases, most of which were reviewed in the *Herndon Case*, demonstrates that no authority is afforded by those two cases for the conception that it is within the power of a State *in any form*, directly or indirectly, *to destroy or deprive of a right conferred by the Constitution and laws of the United States.*"

The significance of the reference to the ground of the decision in the *Herndon* case, becomes more apparent when we recall that the Missouri "anti-removal" statute was declared void (on the authority of *Southern Ry.* v. *Greene*) because a *domestic* railroad company might bring an action in the Federal court, or remove one thereto, when a *foreign* company could not.

For example, in Arkansas to-day, a domestic corporation can institute a suit in the Federal Court, or remove one thereto, without forfeiting its license, whereas a foreign corporation loses its license for the same acts (Sup. Rec. 13). That is certainly a denial of the equal protection of the laws under the Fourteenth Amendment (See the *Greene* and *Herndon* cases); and the Arkansas Statute is unconstitutional (*a*) because it denies the equal protection of the laws, and (*b*) because it destroys the constitutional right to resort to the Federal Courts.

The latest "anti-removal" case, *Wisconsin* v. *Phila. & Reading Coal Co.*, 241 U. S. 329, will be noticed presently (p. 75, *infra*).

The attempted differentiation of the *Doyle* and *Prewitt* cases upon the ground of (*a*) interstate commerce or (*b*) "absolute and relative power", completely failed the first time a case was presented which invalued a purely *intra*-state business over which the State had absolute power.

In *New York Life Ins. Co.* v. *Head*, 234 U. S. 149, the Missouri State court had held that Missouri had absolute power with respect to *insurance* companies; that it only admitted them to do business in the State upon the condition that they would be subject to the laws of the State as if they were domestic corporations; and that any provisions in their policies inconsistent with Missouri laws, should be void. Although not raised by counsel on either side, CHIEF JUSTICE WHITE went out of his way to refer to the doctrine of the *Prewitt* case (as limited in the *Pullman Co.* and *Harrison* cases) that because of the State's complete control over insurance as *intra*-state business it might impose conditions of admission "which otherwise but for the complete power to exclude would be held repugnant to the Constitution" and

thus disposed of even that remnant of the *Prewitt* case by saying (p. 164):

> "But even if it be put out of view that this doctrine has been either expressly or by necessary implication *overruled*, or at all events so restricted as to deprive it of all application to this case (See *Harrison* v. *St. L. & San Francisco R. R.*, 232 U. S. 318, 332, and authorities there cited * * *"

In *Missouri Pac. Ry. Co.* v. *Larrabee*, 234 U. S. 459, it was held that a State could not authorize the recovery of attorney's fees by a successful litigant against another for services rendered in the Supreme Court of the United States. The CHIEF JUSTICE said (p. 471):

> "* * * the right to freely seek access to the Supreme Court of the United States would cease to exist, since it would be in the power of the States to burden that right to such a degree as to render its exercise impossible. * * *
>
> For instance, at this term in *Harrison* v. *St. L. & San Francisco R. R.*, 232 U. S. 318, a statute of the State of Oklahoma which burdened or impeded the right of free access to the courts of the United States was held to be repugnant to the Constitution, and the destructive effect of such legislation upon our institutions was pointed out."

Here again, was another recognition that "anti-removal" statutes were not, as had been held in the *Doyle* and *Prewitt* cases, mere *conditions* of admission, but were positive *burdens* upon the exercise of a constitutional right.

Finally, in *Phœnix Ins. Co.* v. *McMasters*, 237 U.

S. 63, 71, a case involving life insurance, which was not interstate commerce, and which was a subject over which the State had absolute power, the Court again departed from the doctrine of the *Doyle* and *Prewitt* cases that a State might, as a condition of transacting business within the State, impose a requirement that would destroy a constitutional right, saying (p. 71):

> "Furthermore, the Phœnix Company is a foreign corporation, whose license to do business in the State of South Carolina would expire upon the first day of April, 1912, and, therefore, it was within the power of the State, *so long as it did not impose upon the company as a condition of doing business within the State any deprivation of rights secured to it under the Federal Constitution*, to determine for itself the conditions upon which such foreign corporation could do business within the State. This principle has been often affirmed by the decisions of this court, and the insurance company, being within that class of companies not doing an interstate business, the State might, in the exercise of its lawful authority, exclude it from doing business within the State, *so long as no rights conferred by the Constitution and Laws of the United States were destroyed or abridged.*"

The Court thus finally rejected even CHIEF JUSTICE WHITE'S suggestion that the *Prewitt* case might be explained on the theory that because of the State's absolute power over insurance, it could affix any conditions it chose for admission (See 216 U. S. 73-74; 234 U. S. 164); and held that even as the price of admitting an insurance company to do business in the State, it could not affix a condition which would destroy or abridge a Federal right.

III. *The latest authority.* The most recent case is that of *Wisconsin* v. *Phila. & Reading Coal Co.*, 241 U. S. 329, where the very mild Wisconsin "anti-removal" statute was held unconstitutional. It provided that whenever a foreign corporation removed to the Federal Court any suit brought against it by a citizen of Wisconsin *upon a cause of action arising within the State,* the license should be revoked. The effect of the statute was, in the language of the *Prewitt* case, to place foreign companies upon a par with domestic ones doing business in Wisconsin.*

The Coal Company had, for many years, been engaged within the State of Wisconsin in both local and interstate commerce and owned large properties there. It removed a case to the Federal Court and sought to enjoin the Secretary of State from revoking its license because of such removal. The BRIEFS disclose that on behalf of the State it was argued at great length that the purpose of the statute was merely to place domestic and foreign corporations upon the same footing; that there was no requirement of any stipulation not to remove; that the statute was a much narrower one than those involved in the *Herndon* and *Harrison* cases; and that the revocation of the license would not interfere

*The only discrimination in favor of domestic and against foreign corporations, was the very narrow one that while foreign corporations were *not* allowed to remove cases against them by citizens of Wisconsin on causes of action there arising, a domestic corporation might remove to the Federal Court a suit brought by a citizen of Wisconsin upon a cause of action there arising, which presented a Federal question and involved more than $3,000 (See 216 Fed. at p. 202). But even that slight discrimination (216 U. S. 412, 218 U. S. 158) was doubtless enough to invalidate the statute.

in any way with the Coal Co's right to transact interstate commerce or business for the Federal Government, as the license related only to *local* business.

Although the Briefs exhaustively considered all the cases heretofore reviewed, the Court evidently considered the matter as one no longer open to argument and disposed of the case with this brief passage (p. 332):

> "Consideration of the Wisconsin statutes convinces us that they seek to *prevent* appellees and other foreign commercial corporations doing *local* business from exercising their constitutional right to remove suits into Federal Courts. To accomplish this is beyond the State's power. The action of the court below in holding §1770*f* inoperative and enjoining its enforcement as to appellees was correct and its decree must be affirmed.
>
> We are asked in effect to reconsider the question discussed and definitely determined in *Harrison* v. *St. L. & San Francisco R. R.*, 232 U. S. 318. We there said (p. 328):
>
> 'The judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious.' "*

This is the latest decision upon the subject and with it ended the fourth phase of the constitutional battle.

---

* The "anti-removal" acts of Kentucky, Missouri, Alabama, Arkansas, Oklahoma and Mississippi have been held void in the following cases, the opinions in which are worthy of note (*Com.* v. *East Tenn. Coal Co.*, 97 Ky. 238; *Chicago & Ry. Co.* v. *Ludwig*, 156 Fed. 152; *Chicago & Ry.* v. *Swanger*, 157 Fed. 783; *Western Union* v. *Julian*, 169 Fed. 166; *St. Louis & Ry.* v. *Cross*, 171 Fed. 480; *R. R. Co.* v. *State*, 107 Miss. 597; and see note to *Harrison* case L. R. A., 1915 F., p. 1188).

Conclusion.

The Arkansas Act is void as to the Burke Co. engaged in local business just as surely as it is void with respect to any company engaged in interstate commerce—because the right of free and unhindered access to the Federal Courts, whether by original bill, writ of error or certiorari, belongs equally to all corporations; and there is no distinction in the nature of that guaranty between foreign corporations engaged in interstate commerce and those engaged in local business only.

The decree below should be affirmed.

WM. MARSHALL BULLITT,
Counsel for Appellee.

JAS. B. MCDONOUGH,
Of Counsel.

January 16, 1922.

K3541

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

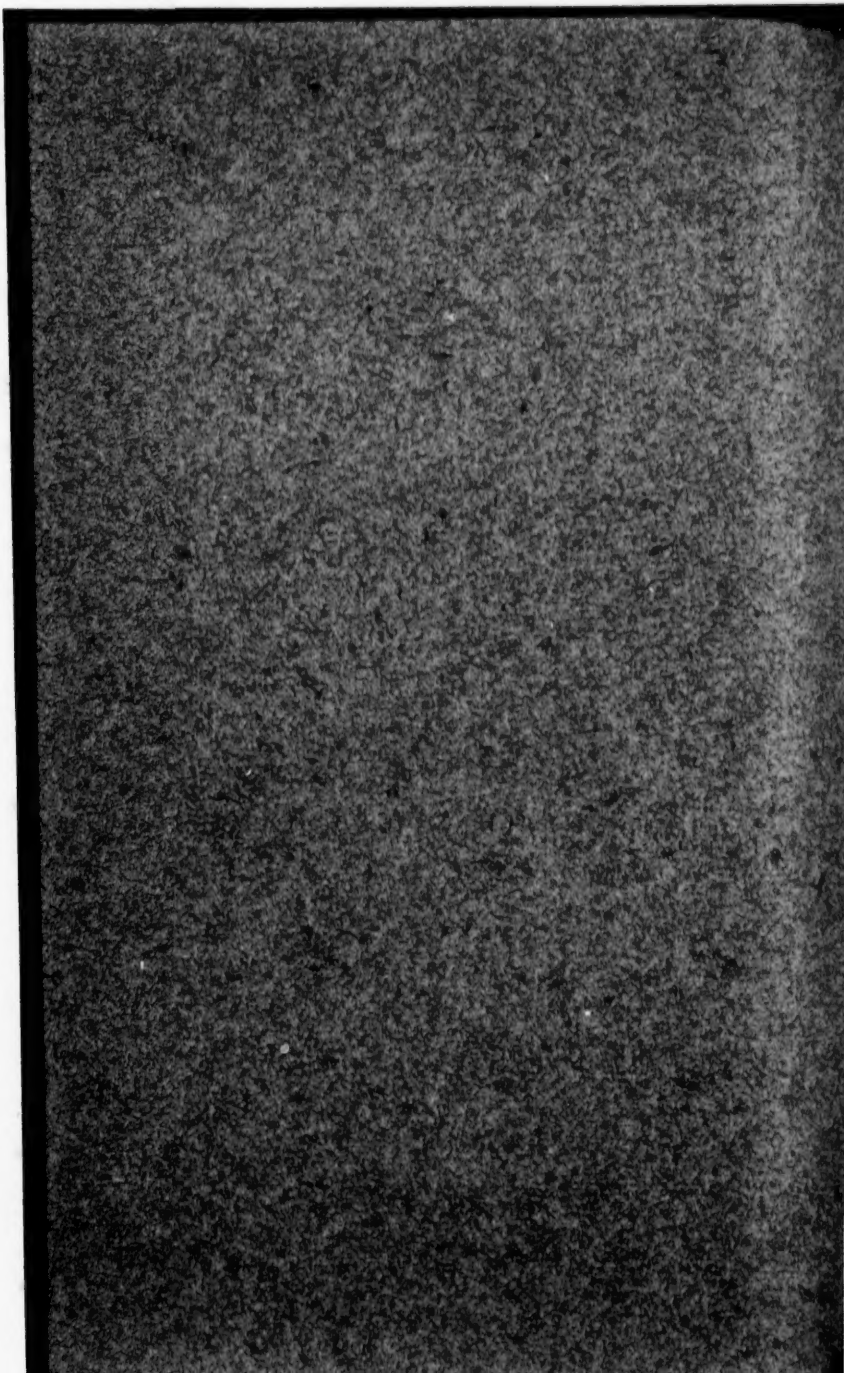
No. 93.

TOM J. TERRAL, AS SECRETARY OF STATE OF THE STATE OF ARKANSAS, APPELLANT,

vs.

BURKE CONSTRUCTION COMPANY, APPELLEE.

MOTION OF APPELLANT TO AMEND RECORD.



INDEX.

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MOTION OF APPELLANT TO AMEND RECORD.

To the Honorable the Judges of the Supreme Court of the United States:

Respectfully comes your petitioner, Tom J. Terral, as Secretary of State of the State of Arkansas, appellant herein, by his Counsel J. S. Utley, Attorney General of the State of Arkansas, and Frank S. Quinn, and moves this Honorable Court to grant to appellant permission to amend the record now on file in this cause, and would respectfully show:

The Decree rendered in this cause by the Honorable District Court of the United States for the Eastern District of Arkansas, Western Division, on the 31st day of May, A. D. 1920, contained a clerical error or misprison, in that the said Decree recited that the cause was heard upon the complaint and answer and "upon statements of counsel in open court," as will be seen by a copy of said decree as set forth and appears at pages 15 and 16 of the Transcript of Record herein, when in truth and in fact the said decree so rendered by said Court on said 31st day of May,

1920, should have recited that the cause was submitted "upon argument of counsel." This appellant shows that on the 20th day of October, A. D. 1921, he applied to the Honorable District Court for said Eastern District of Arkansas, Western Division, to have the said error corrected, and that upon the hearing of appellant's said motion by the said Court, said Motion was sustained, and said Court did correct the said decree to speak the truth.

And this appellant hereto attaches and transmits with this his Motion to Correct the Record and Amend the same, a true and certified copy of all of the proceedings of the said District Court for the Eastern District of Arkansas, Western Division, had upon the hearing before said District Court upon appellant's said application to correct said decree.

Wherefore, appellant prays that the record herein on this appeal be amended, and that said decree rendered on May 31, 1921, be treated and considered as incorrect in respect to the words "statements of counsel," and that the record and proceedings had before the Honorable District Court of the United States for the Eastern District of Arkansas, Western Division, on the said 20th day of October, A. D. 1920, be added to and taken as a part of the record upon this appeal.

J. S. UTLEY, Attorney General,
FRANK S. QUINN,
Counsel for Appellant.

State of Arkansas,
County of Sebastian:

I, Frank S. Quinn, do certify that I am Counsel for the appellant, Tom J. Terral, as Secretary of State of the State of Arkansas, in the above and foregoing proceeding and appeal, and that I did on the 24th day of October, A. D. 1921, duly deliver a copy of the above and foregoing Motion of Appellant to Amend Record to James B. McDonough, Counsel of Record for the appellee, Burke Construction Company, at Fort Smith, in the State of Arkansas.

FRANK S. QUINN,
Counsel for Appellant.

UNITED STATES OF AMERICA,
Eastern District of Arkansas,
Western Division:

Be it remembered, that at a District Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, began and holden on Monday, the ..... day of April, Anno Domini, One Thousand, Nine Hundred and Twenty, at the United States Court Room, in the City of Little Rock, Arkansas, the Honorable Jacob Trieber, Judge presiding and holding said Court, the following proceedings were had, to-wit:

In the District Court of the United States for the Western Division of the Eastern District of Arkansas.

No. 1983.

BURKE CONSTRUCTION COMPANY, Plaintiff,
vs.
TOM J. TERRAL, Secretary of State, Defendant.

Notice of Application to Correct Decree.

To James B. McDonough, Attorney of Record for the Plaintiff, Burke Construction Company:

You are hereby notified, that the defendant will on Thursday, the 20th day of October, 1921, present to the Honorable District Judge of the United States District Court for the Western Division of the Eastern District of Arkansas, a Motion to Correct the Decree rendered herein on the 31st day of May, 1920, a true copy of which Motion is hereto attached. And said Motion will be presented at the Court House of the said United States District Court, at Little Rock, Arkansas, at the hour of 10 o'clock A. M.

Given under our hands on this the 14th day of October, 1921.

J. S. UTLEY, Atty. Gen.,
FRANK QUINN,
Attorneys for Defendant.

State of Arkansas,
County of Pulaski:

I, Frank S. Quinn, one of the attorneys for the plaintiff, hereby certify that I have duly served the above and foregoing notice and motion upon Jas. B. McDonough, Attorney of Record for the defendant, on this 17th day of Oct., 1921, by delivering a copy of said motion and reading this notice to him.

FRANK S. QUINN.

In the District Court of the United States for the Western Division of the Eastern District of Arkansas.

No. 1983 Equity.

BURKE CONSTRUCTION COMPANY, Plaintiff,

vs.

TOM J. TERRAL, Secretary of State, Defendant.

Motion of Defendant to Correct Decree.

Now, comes J. S. Utley, as Attorney General of the State of Arkansas, and Frank S. Quinn, Attorneys for Defendant, Tom J. Terral, as Secretary of State, and respectfully move the Court to correct the Decree heretofore entered in this case on the 31st day of May, 1920, and for cause shows:

That by the said Decree, a copy of which is hereto attached, marked Exhibit "A," it is set forth that this cause was heard "upon the complaint and answer and upon the statements of counsel in open court," when in truth and in fact, the said cause was heard upon the complaint and answer and upon the "Argument of Counsel" in open court. Defendant respectfully shows that the words "Statement of Counsel" is a clerical mis-prison, or inadvertance, and should be "Argument of Counsel."

Defendant respectfully shows that no statement was made by counsel, in the trial of the case, nor were any admissions made by counsel, at said trial, which could be considered as evidence, the said cause being heard entirely upon the bill and answer.

Wherefore, the defendant prays that the said Decree be corrected; that the term "Statements of Counsel" be changed to "Argument of Counsel," in accordance with the truth.

(Signed) J. S. UTLEY, Atty. Gen.,
FRANK S. QUINN,
Attorneys for Defendant.

State of Arkansas,
County of Miller:

Frank S. Quinn, on oath, states that he has read the above and foregoing Motion; that he is one of the attorneys in this cause and that he was present at the submission and argument of said cause; and that the statements contained in the above and foregoing motion are true.

(Signed) FRANK S. QUINN.

Subscribed and sworn to before me, the undersigned Notary Public, on this the 14th day of October, 1921.

(Seal) (Signed) H. M. BARNEY,
Notary Public for Miller County, Arkansas.

My Com. Expires May 2, 1922.

In the District Court of the United States for the Western Division of the Eastern District of Arkansas.

No. 1893 Eq.

BURKE CONSTRUCTION COMPANY, Plaintiff,

vs.

TOM J. TERRAL, Secretary of State, Defendant.

Response of Plaintiffs to the Alleged Motion of the Defendant to Correct the Final Decree.

Comes the plaintiff herein, the Burke Construction Company, and for a response herein, denies that the defendant is entitled to have this decree in any manner changed or modified and denies that there is any need for correction and alleges that the decree as signed and recorded speaks the truth.

The plaintiff further alleges that the said decree was fully approved and agreed to by counsel for the defendant and was entered of record upon the request of said counsel for the defendant, Frank S. Quinn.

For further response the plaintiff states that this cause was tried in this court on May 31, 1920. At the trial of said cause the attorney of the plaintiff made a statement to the court of the facts. Mr. Frank S. Quinn, attorney for the defendant then made a statement to the court. Thereupon the court, upon the complaint and the answer and the statements of counsel, made in open court rendered a final decree in favor of the plaintiff permanently enjoining the defendant from forfeiting the license of the plaintiff. Thereupon the court suggested that counsel prepare the form of the decree. Following the announcement of the court and on the next day, June 1, 1920, counsel for the plaintiff prepared a form of decree. A copy of said form of decree as prepared on the next day, June 1, 1920, is hereto attached and made a part hereof as Exhibit "A" to this response.

Counsel for the defendant, Frank S. Quinn, lives at Texarkana, Arkansas. Counsel for the plaintiff, James B. McDonough, lives at Fort Smith, Arkansas. On June 1, counsel for plaintiff, as stated, prepared said suggestion for the decree and with a letter dated June 1, 1920, transmitted said form of decree to Frank S. Quinn, at Texarkana, through the United States mails. The plaintiff hereto attaches a copy of the letter of transmission and makes the same a part hereof as Exhibit "B."

At the same time and on the same day the plaintiff, through its attorney, forwarded to Mr. Sid B. Redding, Clerk of this

court, a letter enclosing a copy of the proposed decree, stating that the same was a suggestion, requesting the submission of the same to Judge Trieber, and that the said decree either be entered in that form or in such form as might be suggested by counsel on the other side and by Judge Trieber. The plaintiff hereto attaches a copy of the said letter of June 1, 1920, addressed to the clerk, Sid B. Redding, and makes the same a part hereof as Exhibit "C."

Under date of June 2, the attorney for the plaintiff received from the clerk of this court a letter, acknowledging receipt of the form of the decree, suggesting that as soon as he heard from Mr. Quinn he would present the decree to Judge Trieber. A copy of said letter is hereto attached and made a part hereof as Exhibit "D."

Under date of June 3, 1920, Frank S. Quinn, attorney for the plaintiff, wrote a letter to Sid B. Redding, clerk of this court, approving the form of the decree referred to with only one change. That change related to the court to which the appeal was taken. In the original form the appeal had been prayed to the Circuit Court of Appeals of the Eighth Circuit. Mr. Frank S. Quinn changed that, making the prayer to the Supreme Court of the United States. A carbon copy of that letter was sent to the attorney of the plaintiff. A copy of said letter from Frank S. Quinn to the clerk of this court, dated June 3, is hereto attached and made a part hereof as Exhibit "E."

By referring to the decree approved by said Frank S. Quinn, attorney for the defendant, and the decree prepared by the attorney of the plaintiff and submitted as stated, it will be observed that the said Frank S. Quinn fully approved the decree as written with only one change, and that was the change referred to.

Under date of June 3, 1920, said Frank S. Quinn wrote a letter to the attorney of the plaintiff, approving the final decree, which the attorney for the defendant now seeks to change, in the form prepared with the single exception of the court to which the appeal was taken. The plaintiff hereto attaches a copy of the letter from Frank S. Quinn to James B. McDonough, dated June 3, 1920, and makes the same a part hereof as Exhibit "F."

The plaintiff heard nothing further from this case until in January, 1921. After the letter of Frank S. Quinn of June 3, approving the form of the decree no further correspondence took place between Frank S. Quinn and counsel for the plaintiff until

January, 1921. Counsel for the plaintiff did not know whether said Frank S. Quinn was appealing said case upon the decree alone without evidence or whether he was preparing a statement of the evidence to be made a part of the record. Counsel for the plaintiff had no knowledge of whether counsel for the defendant intended to appeal upon the record only, without setting out the evidence or whether he intended to set out the evidence until counsel for the plaintiff had received a copy of the transcript.

On January 13, 1921, the attorney for the plaintiff wrote to the clerk of the Supreme Court of the United States, asking whether the defendant had appealed this case to that court. Under date of January 17, the clerk of the Supreme Court of the United States advised said attorney that the case was pending there and was numbered 419, October Term, 1920. The attorney for the plaintiff then requested and secured from the clerk of the Supreme Court of the United States a copy of the printed record. From the date of the last letter of Frank S. Quinn, dated June 3, 1920, the plaintiff herein heard nothing more of this cause until after it was learned that same had been docketed in the Supreme Court of the United States. In due time thereafter the defendant prepared and filed its brief in the Supreme Court of the United States, taking a position as counsel for the plaintiff believes, in that court, inconsistent with the record in this court. Counsel for the plaintiff herein then prepared and printed and served upon the defendant a brief for the plaintiff herein, appellee in the Supreme Court of the United States. So far as the plaintiff is advised the defendant at no time raised any question as to the correctness of the decree until after the receipt of a copy of the brief of the appellee in the Supreme Court of the United States. The plaintiff herein respectfully submits that the defendant is not entitled to have any change made in the final decree as rendered. The defendant approved that decree by its attorneys of record and consented that the same should be entered as it was entered. Statements of counsel were made at the trial of the case and said statements were received as evidence and in place of evidence. No objection was made either by plaintiff or defendant to the method of the trial of the case. After the decree had been agreed to by the defendant and after the defendant had requested the court and the clerk to enter the decree and after the case has been appealed to the Supreme Court of the United States and briefs filed by both sides, said defendant has

not the legal right to change the record and therefore his petition to that effect should be denied. The said defendant is estopped from asserting a right to change said decree. The plaintiff has gone to considerable expense in employing counsel to brief the case upon the record and relying upon the record as speaking the truth and in printing said brief. In addition the said record speaks the truth as set out. The plaintiff was engaged in interstate commerce at the time. It has since been engaged in interstate commerce. The plaintiff is ready and willing to approve that if such proof can be introduced and admitted now.

Premises considered the plaintiff prays that the motion of the defendant to change the record be denied.

THE BURKE CONSTRUCTION COMPANY,
By (Signed) JAMES B. McDONOUGH,
Its Counsel.

Affidavit.

I, James B. McDonough, on oath state that I am of counsel for the plaintiff in the above entitled cause; and I further state that I was present at the trial of this case and that I had with me there, M. C. Burke, president of the plaintiff, and said M. C. Burke has since died, and that the matters and things set forth in the above and foregoing response are true to the best of my knowledge and belief.

I did make statements of fact to the court and Mr. Frank S. Quinn did make statements of fact to the court and at the conclusion of these statements and without any further evidence the court rendered a final decree in favor of the plaintiff, basing said decree upon the complaint, the answer and the statements of counsel in open court as the court announced at the time. I returned home that night. On June 1, the next day, I prepared the decree while the same was fresh in my mind, I submitted it to Mr. Frank S. Quinn, by letter. I sent a copy of it to the clerk of this court. I requested Mr. Quinn to make any changes which he saw proper. He only made the one change referred to which changed the appeal from the Circuit Court of Appeals of the Eighth Circuit to the Supreme Court of the United States. The decree, as I remember it, speaks the truth.

(Signed) JAMES B. McDONOUGH.

Subscribed and sworn to before me this 18th day of October, 1921.

(Seal) (Signed) ANNIE ALTMILLER,
Notary Public.

EXHIBIT "A."

In the District Court of the United States Eastern District of Arkansas, Western Division.

In Equity.

BURKE CONSTRUCTION COMPANY, Plaintiff,

vs.

TOM J. TERRAL, Secretary of State of the State of Arkansas, Defendant.

Final Decree.

On this day came on for trial the above entitled cause. The plaintiff appeared by its attorney, James B. McDonough, and the defendant appeared by the attorney general, the Honorable John D. Arbuckle, and also by Frank S. Quinn. Both parties announced ready for trial.

Upon the complaint and answer and upon the statements of counsel in open court the court finds that the Act of the General Assembly of the State of Arkansas, being the Act of May 13, 1907, purporting to authorize the Secretary of State to forfeit the license of a foreign corporation to do business in the State of Arkansas is illegal and void, being contrary to sections one and two of the Fourteenth Amendment to the Constitution of the United States.

It is therefore by the court ordered, adjudged and considered that the defendant, Tom J. Terral, Secretary of State of the State of Arkansas, and his assistants, agents, attorneys and representatives be and they are hereby forever enjoined and restrained from in any manner forfeiting the license of the Burke Construction Company, a corporation organized under the laws of the State of Missouri, to do business in the state of Arkansas.

It is further ordered, adjudged and considered that the plaintiff shall have and recover of and from the defendant all costs in this action laid out and expended. As to said costs it is further ordered, adjudged and decreed, that execution thereon be suspended until the Legislature of the State of Arkansas shall have had an opportunity to enact the legislation for the payment of said costs.

The defendant excepted to the finding of the court, and prayed an appeal to the Circuit Court of Appeals of the Eighth Circuit, which was granted.

....., *Judge.*

EXHIBIT "B."

June 1, 1920.

Mr. Frank S. Quinn,
Attorney at Law,
Texarkana, Arkansas.

Dear Sir:

In the case of Burke Construction Company vs. Tom J. Terral. After thinking over the matter and examining the law, and the form of decrees of this kind, I reached the conclusion that the enclosed copy of a proposed decree covers the matter. I do not overlook considering what you said about the court stating in his opinion that it was immaterial whether the Burke Construction Company was engaged in Interstate Commerce. I do not really believe that that should be a part of the decree. I submit this to you and will be glad to have you look it over and if you desire to make any suggestions, adding to this in any way or taking from it, kindly write to the clerk at Little Rock, Mr. Sid B. Redding, and send me a carbon copy of what you write as well as a carbon copy of your suggestion. I am mailing a copy of this letter to you to the clerk at Little Rock.

Yours truly,

JAMES B. McDONOUGH.

JBM/S
C. C. Mr. Redding.

EXHIBIT "C."

June 1, 1920.

For Attention of Mr. W. P. Feild.
Mr. Sid B. Redding,
Clerk U. S. Dist. Court,
Little Rock, Arkansas.

Dear Sir:—

In the case of Burke Construction Company vs. Tom J. Terral, Secretary of State, which was tried before Judge Trieber yesterday.

I herewith hand you my suggestion for a final decree, I am sending carbon copy of this by this mail to Mr. Frank S. Quinn. I have requested him to write you suggesting any changes which he may desire to submit to the court. As soon as you hear from him, submit to Judge Trieber, suggesting that the final decree be entered, if not in this form in such form as may be desired by Judge Trieber.

I wish you would kindly let me know the number of the case as it appears on your dockets.

Yours truly,
JAMES B. McDONOUGH.

JBM/S
Encl.

EXHIBIT "D."

Little Rock, Ark.
June 2, 1920.

Mr. J. B. McDonough,
Attorney at Law,
Fort Smith, Arkansas.

Dear Sir:

We are in receipt of your letter of the first inztant with enclosures in case of Burke Construction Co. vs. Terral. As soon as we hear from Mr. Quinn, will present the decree to Judge Trieber.

This case is No. 1893 on the Equity Docket.

Yours very truly,
SID B. REDDING, *Clerk*,
By W. P. FIELD, JR., *D. C.*

EXHIBIT "E."

June 3, 1920.

Mr. Sid B. Redding,
Clerk, U. S. Court,
Little Rock, Arkansas.

Dear Sir:—

In the case of Burke Construction Company v. Terral, Secretary of State, in Equity, Mr. McDonough forwarded to me copy of Final Decree. The decree submitted by Mr. McDonough showed an appeal prayed and granted to the Circuit Court of appeals, when the appeal should have been to the Supreme Court of the United States. I therefore changed the decree in this respect and enclosed you will find the copy of the decree. Will you kindly present the decree to Judge Trieber for his approval.

Enclosed I also hand you petition for appeal and assignment of errors. I wish you would present this also to Judge Trieber, and if he thinks it is necessary to endorse the granting of the appeal upon the petition, kindly request him to do so.

I also enclose letter, in the nature of a precipe, showing what papers we desire sent up in the transcript.

Will you kindly write me as to the approval of the decree, etc., as early as possible, as I understand we have only 30 days from May 31, in which to have our transcipt in the Supreme Court.

Yours very truly,

FSQ/S (Signed) FRANK S. QUINN.

EXHIBIT "F."

June 3, 1920.

Mr. James B. McDonough,
Fort Smith, Arkansas,

Dear Sir:—

Yours received, enclosing copy of final decree in the Terral case. I have changed the last page of the decree fo as to pray an appeal to the Supreme Court of the United States. This is what I understood the court to grant.

Regarding the other feature, as to the finding of the court that the nature of the business of the Burke Construction Company was unimportant, the manner in which you have framed the decree possibly will permit us to raise that question on appeal. I have therefore forwarded the decree as prepared by you, with the correction as to the appeal to the Supreme Court of the United States, to the Clerk at Little Rock and have asked him to present the decree to Judge Trieber for approval.

Yours very truly,

FRANK S. QUINN.

In the District Court of the United States for the Western Division of the Eastern District of Arkansas.

No. 1980—Equity.

BURKE CONSTRUCTION COMPANY, Plaintiff,

vs.

TOM J. TERRAL, Secretary of State, State of Arkansas, Defendant.

TRIEBER, District Judge, at the conclusion of the hearing of the motion to correct the decree entered in this cause entered at the April Term, 1920, of this court, so as to make it speak the truth, orally delivered the following opinion:

The decree recites that "the cause was heard upon the complaint and answer, and upon the statements of counsel in open court." The petition for the *nunc pro tunc* order alleges that the word "statements" preceding the words "of counsel" was erroneously inserted by the clerk, instead of "argument" as no statements were made by counsel in the nature of evidence, but the cause was submitted on the pleadings and arguments of counsel.

I presided at the hearing of this cause and remember distinctly what was said and done at the trial. The only statements made by counsel were the substances of the pleadings, and nothing was said of the facts, except that counsel admitted that plaintiff is a foreign corporation. Counsel for defendant relied upon *State* v. *Hodges*, 114 Ark. 156, as conclusive. The court at the hearing declined to follow this ruling and announced that in its opinion, it is wholly immaterial whether the plaintiff was engaged in interstate or any commerce, as the statute complained of, the Act of the General Assembly of the State of Arkansas of May 13, 1907 (Acts of Arkansas, 1907, page 744), Sect. 1831, Crawford & Moses Digest of Statutes of Arkansas, 1921, known as the "Wingo Act," was unconstitutional for two reasons:

First. The Act seeks to deprive foreign corporations licensed to do business in the State of Arkansas of the right to institute a suit in a court of the United States, or remove a cause from a state court to such a court, thus attempting by indirect means to deprive them of a right granted by an Act of Congress authorized by the Constitution of the United States. The court reached this conclusion on the authority of *Harrison* v. *St. Louis & San Francisco Railroad Co.*, 232 U. S. 318, *New York Life Insurance Co.* v. *Head*, 234 U. S. 164, and *Wisconsin* v. *Pennsylvania & Reading Coal Co.*, 241 U. S. 329.

Second. The Act is also unconstitutional in view of the fact that it discriminates against foreign corporations, licensed to transact business in the State, by depriving them of the right to institute a suit in or remove a cause from a state court to a court of the United States, while domestic corporations are permitted to do so, if the statutory grounds therefor exist. Art. 12, Sect. 11 of the Constitution of the State authorizes foreign corporations to do business in the State under such conditions as may be prescribed by the General Assembly. Section 1827, Crawford & Moses Digest of Arkansas Statutes, among others contains the

following provision: "Such corporation (foreign) shall be entitled to all the rights and privileges and subject to all the penalties conferred and imposed by the laws of this State upon similar corporations formed and existing under the laws of this State." This has been held by the Supreme Court of the State to make the foreign corporation a domestic corporation, empowered to exercise the right of eminent domain. Although the Constitution denies foreign corporations the right to condemn private property. *Russell* v. *St. Louis Southwestern Ry. Co.*, 72 Ark. 451.

This court in *Chicago, Rock Island & Pacific Ry.* v. *Ludwig*, 156 Fed. 152, declared this statute unconstitutional upon that ground. At the same term it also declared it unconstitutional on the same ground in an action by the *Western Union Telegraph Co.* v. *Ludwig*, following what was decided in the Rock Island Railroad case, but wrote no opinion in the last case. Both cases were appealed to the Supreme Court. In the Western Union case the decree of this court was affirmed, but the court in its opinion did not deem it necessary to pass upon this question, affirming the decree upon other grounds. 216 U. S. 146, 163. Thereupon the appeal in the Chicago, Rock Island & Pacific Ry. case was dismissed by the appellant. 215 U. S. 615. But in *Herndon* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 135, 158, the ruling of this court on this point was expressly sustained.

When the decree was presented to me by the clerk for signature, I merely examined the part of the decree proper, without reading the recitals preceding it, and finding that a perpetual injunction was granted thereby, I signed it.

The recital that the cause was heard upon "the statements of counsel" was clearly wrong, as none were made by counsel, and no facts, except those set out in the pleadings and the admission hereinbefore set out were presented and considered. It was a mistake of the clerk to insert it in the decree and was incorrect. Evidently he intended to insert "argument" of counsel and by inadvertance used the word "statements" instead of "argument." Be that as it may, the recital does not state the truth, and therefore it is not a correct record.

Has the court the power to make this correction after the term has lapsed?

That it has is beyond question. *In re Wight*, 134 U. S. 136, 143-4, *Hickman* v. *Fort Scott*, 141 U. S. 413, *United States* v. *Mayer*, 234 U. S. 55, 67, *United Zinc, Etc., Co.* v. *Britt*, 264 Fed. 785 (C. C. A. 8th Ct.). *In re Wight* the *nunc pro tunc* order recited that "the court of its own motion, based upon its recollection of the facts," made the order which was sustained.

Now is it necessary that notice of a correction in a decree by a *nunc pro tunc* order be given to the adverse parties when the judge acts upon his own recollection, although the better practice is to serve notice, as was done in the instant case. In *Groton Bridge Co.* v. *Clark Pressed Brick Co.*, 126 Fed. 552, this court had that question before it, and sustained the power of the court to correct its decree or judgment by a *nunc pro tunc* order after the term had lapsed, without notice to or appearance by the adverse party, when the presiding judge acts upon his own knowledge and recollection. This was affirmed by the Circuit Court of Appeals for this circuit in 136 Fed. 27, 68 C. C. A. 577, in an able opinion in which numerous authorities are cited. See also, *Odell* v. *Reynolds*, 70 Fed. 656, 17 C. C. A. 317.

The correction will be made as of the date the decree was entered, so that the decree shall speak the truth, and the clerk is directed to strike out the word "statements" before the words "of counsel" and in lieu thereof insert "argument" so that the decree may speak the truth.

(Signed) JACOB TRIEBER, *Judge*.

In the District Court of the United States for the Western Division of the Eastern District of Arkansas.

No. 1983 Equity.

BURKE CONSTRUCTION COMPANY, Plaintiff,

vs.

TOM J. TERRAL, Secretary of State, State of Arkansas, Defendant.

Order.

On this day the motion of the defendant to correct the decree herein by a *nunc pro tunc* order so as to make it speak the truth came on to be heard, both parties appearing by their respective solicitors, and the court being sufficiently advised, and the presiding judge being the same judge who presided at the hearing of this cause and rendered the final decree, and knowing from his

own recollection of the facts that no statements were made by counsel as to any facts, except that defendant admitted that plaintiff was a foreign corporation, nor any evidence whatever introduced, but that the cause was heard and determined on the pleadings and that admission alone, and that the insertion in the decree that the cause was heard upon "statements of counsel" is incorrect, and inserted by mistake of the clerk it is

THEREFORE ORDERED, ADJUDGED AND DECREED that the said decree be corrected *nunc pro tunc* as of the date it was rendered and entered, by striking out the word "statements" preceding the words "of counsel" and insert in lieu thereof the word "argument" so that the decree may speak the truth.

(Signed) JACOB TRIEBER,
U. S. District Judge.

UNITED STATES OF AMERICA,
Eastern District of Arkansas,
Western Division.

I, Sid B. Redding, Clerk of the District Court of the United States for the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writing annexed to this certificate is a true, correct and compared copy of the original remaining of record in my office, at Little Rock, Arkansas, of the application to correct decree and proceedings and decree of the court thereon rendered on the 20th day of October, 1921, in case No. 1983 Equity, Burke Construction Co. vs. Tom J. Terrall, as Secretary of State.

In witness whereof, I have hereunto set my hand and the seal of said court, this 20th day of October, in the year of our Lord, One Thousand Nine Hundred and Twenty, and of the Independence of the United States of America, the One Hundred and Forty-sixth.

(Seal)

SID B. REDDING, *Clerk.*
By W. S. ALLEN, *D. C.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924

No. [illegible]
[illegible] October Term, 1924

TOM J. TERRAL, AS SECRETARY OF STATE OF THE STATE OF ARKANSAS, APPELLANT

vs.

BURKE CONSTRUCTION COMPANY, APPELLEE

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF APPELLEE

JAMES H. McDONOUGH,
Counsel for Appellee.

INDEX.

Table of Cases.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 93, being
No. 419 October Term, 1920.

TOM J. TERRAL, AS SECRETARY OF STATE OF THE STATE OF ARKANSAS,
APPELLANT,

VS.

BURKE CONSTRUCTION COMPANY,
APPELLEE.

MOTION OF APPELLEE FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF.

Comes the Burke Construction Company, appellee in the above entitled cause, through its counsel, and herewith tenders a supplemental brief and petitions the court for leave to file said brief for the reasons stated below. The ground upon which the said Burke Construction Company bases this request is as follows:

I.

The record in this cause was filed in this court on June 24, 1920. On October 20, 1921, nearly eighteen months after the cause was tried below, and after both sides had fully briefed this cause in this court, the appellant obtained in the court below a *nunc pro tunc* order modifying the final decree. The purpose of said amendment apparently was to modify the original decree so that the same would not contain the words "statements of counsel in open court," but "argument of counsel," and also to show that no evidence was introduced at the trial. It seems to be the view of counsel for the appellant that recitals in an order made *nunc pro tunc* as it were, may be used as a substitute for the evidence as required by Equity Rule 75. Counsel for appellee does not so understand the practice and the rules. As the decree appears in the original record (page 15), and in the absence of a statement of the evidence, as required by Rule 75, there is nothing to show what evidence was introduced. However, in the "order" made October 20, 1921, and after appellee's brief was filed, amending the decree, there appears a recital "that no statements were made by counsel as to any facts except that defendant admitted that plaintiff was a foreign corporation, nor any evidence whatever introduced." It is also recited in said "order" that "the cause was heard and determined on the *pleadings*" and the admission that plaintiff was a foreign corporation. This amendment if accepted and considered, makes a radical change in the record, on account of which the appellee will be done an injustice,

unless permitted to file this supplemental brief. Therefore, this amendment makes it necessary that appellee file this brief, presenting and discussing the important questions now involved, as they appear in the record as amended.

Premises considered, the appellee prays that it be permitted to file this supplemental brief, and requests that said supplemental brief be considered in the decision of the important questions involved in this cause.

JAMES B. MCDONOUGH,
Counsel for Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 93, being
No. 419 October Term, 1920.

TOM J. TERRAL, AS SECRETARY OF STATE OF THE STATE OF ARKANSAS, APPELLANT,

VS.

BURKE CONSTRUCTION COMPANY, APPELLEE.

SUPPLEMENTAL BRIEF OF APPELLEE.

The amendment to the record recently filed, if permitted, makes it essential on the part of the appellee to file this supplemental brief.

The appellant, after the case was briefed on both sides in this court, secured in the court below an amendment, changing the form of the final decree. The said

amendment was made on October 20, 1921, and long after the term of court had expired. Soon after said amendment was made, the appellant filed in this court a printed document entitled "Motion of Appellant to Amend Record." For brevity said motion will be referred to as "motion," and the record will be referred to as "record." The pages in each will be referred to by figures in parenthesis.

The trial in the court below occurred (motion 3) on May 31, 1920. On the next day (motion 10) counsel for appellee prepared a suggestion for a decree, sending same to counsel for appellant, with request to examine same, and add to it or take from it in any way that said counsel should determine. In that letter (motion 10) said counsel requested to be advised as to any changes that were made. On the same day counsel for appellee wrote the clerk of the court (motion 10) suggesting that the form of the final decree be entered after counsel for the appellant had made any changes which said counsel might desire, and requesting the clerk to submit the form of decree to the judge, *after said form had been received from counsel for the appellant.* On June 3, 1920, (motion 11) counsel for the appellant made changes in the form of the decree, and sent same to clerk, requesting the clerk to *"present the decree to Judge Trieber for his approval."* On the same day counsel for the appellant (motion 12) wrote counsel for the appellee, stating that he had forwarded the decree with the change indicated to the clerk, asking the clerk to present the same *"to Judge Trieber for his approval."*

From that date until after the transcript was filed in this court, no further communication passed beween counsel for the appellant and counsel for the appellee (motion 6). The next information which counsel for the appellee had of this cause, was the information from the clerk of this court that the transcript had been filed here. In the response of appellee in the court below (motion 7) it is alleged that the appellant is estopped from now asking an amendment to said original decree, the same having been approved and signed by the court below *at the request of counsed for the appellant*. Counsel for the appellee had no knowledge until after the transcript was filed in this court, as to whether the appellant would appeal on the record made by his own counsel, or whether there would be a statement of the admitted facts, or other evidence, if any, either in the *pleadings* or otherwise.

Counsel for the appellee, in the court below, and here, relies upon the contention that the Burke Construction Company is a commercial corporation, and is, in part, engaged in Interstate Commerce. The amendment to the record, if permitted, may remove that question from the cause. Hence, the appellee desires to submit a supplemental argument in order to show that the cause should be affirmed, notwithstanding the amendment to the record.

It was the duty of appellant to prepare a proper record containing the facts.

This duty is imposed upon the appellant under Equity Rule 75. That rule requires a narrative state-

ment of the evidence, if there was any evidence. It is the contention of the appellee that neither the original decree nor the amended decree, if the latter can be considered, can take the place of a recital of the facts. Neither can the opinion of the court take the place of a statement of the evidence. The effort to amend seems to be contrary to Equity Rule 72. Said amendment was made after the lapse of the term. It is claimed that it was made for the purpose of making the decree speak the truth. In the opinion of the writer, said attempted amendment is made in violation of Equity Rules 71 and 72. Equity Rule 71 prescribes the form of the decree. That rule does not require or permit any reference to the pleadings or any part thereof. It does authorize a recital that the cause came on to be heard and was argued by counsel. The so-called amended decree or order appears on page 15 of the motion recently filed. That order recites that no statements were made by counsel as to any facts, except that defendant admitted that plaintiff was a foreign corporation, and further recites that no evidence whatever was introduced. It is then recited that the cause was heard and determined on the *pleadings* and the admission alone. This shows that the pleadings were considered as establishing facts. The decree is then amended by striking out "statements" of counsel, and inserting "argument" of counsel.

Under these facts, counsel for the appellee has grave doubts as to the rights of the appellee. It is therefore suggested that the amended decree may not add to or take from the original decree, because it attempts to re-

cite facts although stating that no evidence was introduced, and because a different record is now before the court, and under the alleged amended decree appellee is denied the right to prove that it is engaged in interstate commerce.

Counsel for the appellee does not desire to suggest any technical question that will avoid the determination of the important questions in the record on their merits. Said counsel, however, does not feel authorized to waive the questions caused by the conduct of the appellant. The appellee bases its right to injunctive relief in the court below, as well as here, in part upon the fact that it was a *commercial corporation*, and in part engaged in interstate commerce. If the amendment to the record is received, the appellee respectfully submits that it may be denied that right *waiving that question, for the sake of the argument, and going to the merits of the cause, three controlling questions still grow out of the record as amended.* The first is that upon the record as amended the presumption is that the decree was based upon sufficient facts as shown by the pleadings or otherwise, to call for an affirmance notwithstanding the recitals in the amendment. The second point it that the appellee was engaged in interstate commerce, and that the state law was void, and that said state law was an attempt to take from the appellee a constitutional federal right to bring and maintain suits in the United States courts. The third point is that the Act of Arkansas under consideration is void, because it discriminates in favor of *domestic* corporations as against *foreign* corporations, contrary to the Constitution of the State of Arkansas, and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. These three questions will be briefly discussed.

I.

Under the amended decree, it is respectfully submitted that the cause should be affirmed because of the presumption that the court found sufficient facts upon the pleadings and the admission to warrant a final decree.

It is respectfully submitted that the decree itself, neither the original nor the amended decree, can be used under the rules, as a statement of evidence. Under Equity Rule 71 a decree cannot contain the recital of the facts. It would therefore seem that neither the opinion of the court, which is in the record, nor the decree itself, can be used as a statement of the facts upon which the court rendered the decree. It is therefore respectfully submitted that the authorities cited by me in my original brief, pages 11 to 14 inclusive, call for an affirmance of the decree.

II.

The Act of the General Assembly of the State of Arkansas of May 13, 1907, is illegal and void, because it attempts to deprive appellee, which had been doing business in Arkansas, for four years, under license from the state, of the right to institute a suit in a court of the United States, or to remove a cause from the state court to said United States Court, thus attempting by indirect means to deprive appellee of a right granted it by an Act of Congress authorized by the Constitution of the United States.

As is shown by the motion, page 13, this is the first ground upon which the learned district judge made the injunction perpetual. It was held by the learned district

judge, that Act 313 of 1907 was void, because the purpose of it was to deprive foreign corporations licensed to do business in Arkansas, of a right to bring and maintain suits in the United States courts. He held that said act deprived foreign corporations of a right granted them by a constitutional act of Congress. The cases cited by the learned district judge, in support of his opinion, are cited in my former brief.

On account of the amended record, I deem it appropriate to call this court's attention to some of the allegations in the complaint. After alleging that the plaintiff is a Missouri corporation (Record 1), and after setting out the sections, being 6 and 11 of Article 12 of the Constitution of Arkansas, the bill of complaint then sets out the Arkansas Act dated May 13, 1907, and found in the Acts of 1907 at page 744. The terms and requirements of that act are more fully discussed in the next paragraph of this brief.

Paragraph 2 of the complaint alleges that the plaintiff is organized to do a general road and other construction work. It is actually engaged in the construction of work in Arkansas and that in the course of its operations it is engaged in interstate commerce, and receives and forwards much freight in interstate commerce in its business in Arkansas. It purchases material in other states, and ships its material and equipment in interstate commerce, thus enabling it to carry on the local construction in the State of Arkansas. It is therefore clear that the shipment of equipment and material and men from state to state is a necessary element, and part of, the

construction work in Arkansas. Therefore, the interstate commerce feature of the plaintiff's business is inseparably connected with the construction work in Arkansas.

In 1916 plaintiff applied to the Secretary of State of the State of Arkansas to do business in Arkansas as a foreign corporation, and complied with the conditions of the laws of Arkansas, entitling it to do business in that state as a foreign corporation. The proper certificate was issued to it to do business in the State of Arkansas.

In passing i desire to call this court's attention at this time, to the fact that under said Act of May 31, 1907 of Arkansas, the license is not limited to any particular time, not being granted for a definite period. It is an indefinite license, and no authority is given to the Secretary of State to cancel said license, except on the ground that the foreign corporation has brought a suit in the United States District Court, or has removed a suit to that court.

Plaintiff (Record 4) further alleges that it paid into the treasury of the State of Arkansas all the fees required under the provisions of said Section 3 of the Act of 1907, and all acts amendatory thereof. It is then alleged that the plaintiff after the issuance of the license to it, became entitled to all the privileges granted to domestic corporations. That under Section 11 of Article 12 of the Constitution of Arkansas, the plaintiff having been admitted to do business in Arkansas, by that act, became the possessor of all legal rights granted to do-

mestic corporations, from which it follows that, as *domestic corporation are granted the right to bring suits in the federal courts, the plaintiff under the federal constitution, as well as the state constitution, cannot be denied by any state action of the exercise of that same right*, without violating the fourteenth amendment as to the equal protection of the laws, and the equal enjoyment, without discrimination of constitutional federal rights.

The plaintiff further alleges that this right to do business in Arkansas is a valuable right, and that after said license was granted to it, and relying upon the same, it had invested hundreds of thousands of dollars in the State of Arkansas, and now owned in that state, large tracts of land, valuable machinery and other property, aggregating in value $75,000.00 (Record 5). It is then alleged that the appellant was about to revoke its license on the sole ground that it had brought a suit in the United States District Court for the Western District of Arkansas, Texarkana Division, and had removed another suit thereto. It further alleges (Record 5) that the defendant as Secretary of State, is claiming the right to revoke its license to do business in Arkansas, under the terms of said Act of May 13, 1907, and the clause of that act upon which the Secretary of State relied, is set out in the bill (Record 5) is as follows:

> "If any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this state, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citi-

> zen of this state in any federal court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this state, and to publish such revocation in some newspaper of general circulation, published in this state, and if such corporation shall thereafter continue to do business in this state, it shall be subject to the penalty of this act for each day it shall continue to do business in this state after such revocation."

It is therefore to be observed that if the Secretary of State has any authority to revoke any license at all, said authority is based solely upon the clause just quoted. *There is no general authority nor any other authority outside of that clause, giving the Secretary of State any power to revoke any license.*

The plaintiff then alleges (Record 5) that if its license is revoked, it will be subjected to heavy penalties amounting to $1000.00 per day, and that the penalties, if it attempted to sue in the courts of law for relief, during the period of the litigation, would amount to a confiscation of its property, and that it would be denied the equal protection of the laws under Section 1 of the Fourteenth Amendment to the Constitution of the United States, if the Secretary of State be not enjoined from revoking said license.

It is then alleged (Record 6) that the provision above quoted of said Act of 1907 is void, because in violation of Section 11 of Article 12 of the Constitution of Arkansas. Said Section 11 of Article 12 appears on page 2 of the transcript, and has in it the following provision:

III.

The Act of Arkansas in question is unconstitutional because it discriminates against foreign corporations, and denies to them the equal protection of the laws, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, in this: Domestic corporations in Arkansas by the Constitution and Laws of that State, are permitted to exercise the Federal right to bring suits in the United States District Courts, and to remove suits to said courts, in proper cases, and Section 11 of Article 12 of the Constitution of the State of Arkansas gives to foreign corporations, admitted into the state to do business, exactly the same rights and privileges which are granted to domestic corporations in that state. Therefore, domestic corporations in Arkansas have the absolute right and privilege to use, enjoy and exercise the right of removal granted by Federal law and the right of bringing suits in United States Courts, also granted by Constitutional Federal law. Hence, the same right cannot be denied to foreign corporations.

In considering this question, which is the second point upon which the court below granted the perpetual injunction (motion 13), it will be necessary to consider briefly some of the allegations of the answer, the allegations of the complaint already having been referred to.

Waiving any question as to whether the answer sufficiently denies the allegations of the complaint, insofar as said allegations involve the first and second points above discussed, I invite the court's attention to paragraph III of said answer (Record 12). In that the defendant admits that the right of the plaintiff to do business in Arkansas is a valuable right. In effect that

is an admission that the plaintiff has in Arkansas valuable property. It is then alleged that the license to do business in Arkansas requires the previous agreement of the foreign corporation not to bring suits in the United States courts. The cases cited in my former brief show that such an agreement is wholly void. The answer then alleges that under said Act of Arkansas, corporations authorized to do business thereunder should not bring a suit in the United States District Court against a citizen of Arkansas. The answer evidently refers to *foreign* corporations, for the reason that there is no statute in Arkansas prohibiting domestic corporations from maintaining suits in the United States Court, in proper cases.

The defendant then further alleges that said Arkansas Act provides that the bringing of a suit by the plaintiff, required that the defendant as Secretary of State, revoke the license of plaintiff to do business in Arkansas. That is a plain admission, that the only authority of the Secretary of State to revoke the license is found in said Act of 1907. It is not contended that there is any general authority given by the State of Arkansas to the Secretary of State to forfeit the license of a foreign corporation. It is then alleged that the "conditions" of said Act of Arkansas was a part of the right of the plaintiff to carry on its Arkansas business. It is not denied in that paragraph that the Arkansas business is in part interstate business. It is alleged that the plaintiff took the license to do business with the liabilities thereunder, as well as the benefits and privileges accorded by the statute, and agreed to said liabilities, as well as agree-

> "and as to contracts made or business done in this state, they (foreign corporations) shall be subject to the same regulations, limitations and liabilities as like corporations of this state."

The plaintiff then alleges that said clause of said Act of 1913 above referred to is void because in conflict with section one of the 14th Amendment to the Constitution of the United States, and also the Commerce Clause and Section 2 of Article 3, and Section 10 of Article 1. It is alleged that the effect of said Arkansas Act is to defeat the jurisdiction of the courts of the United States in controversy between citizens of different states in that it imposes penalties upon the exercise of the right to bring suits in the federal courts, and is an unlawful attempt to prohibit foreign corporations legally admitted to the state, from exercising their constitutional right of litigating controversies in the federal courts. Paragraphs (e) and (f) (Record 7) of said answer specifically allege that said Act of 1907 is contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiff of its right to transport its property in interstate commerce, and deprives it of its property without due process of law, and deprives it of the equal protection of the laws, as guaranteed to it by said section. It seems in view of these allegations and the law, unnecessary to prolong the discussion on this point.

In my opinion, the case comes squarely within the rule announced in *Donald* v. *P. & R. Coal & I. Co.*, 241 U. S. 329. It is clear from this record and from the

terms of the Arkansas Act itself, that the clause above referred to was enacted solely for the purpose of preventing the foreign corporations lawfully doing business in Arkansas from resorting to the federal courts in litigation. The act therefore seeks to prevent the plaintiff, as well as other foreign commercial corporations, from doing local business in Arkansas, from exercising their constitutional right to remove suits into the federal courts. In the Donald case just cited, this court speaking of the power of the state to enact such a law said:

> "To accomplish this is beyond the state's power."

This court, after citing other cases, concluded the opinion in that case by quoting from the Harrison (232 U. S. 318) case as follows:

> "The judicial power of the United States as created by the constitution, and provided for by Congress, pursuant to its constitutional authority, is a power wholly independent of state action, and which therefore the several states may not by any exertion of authority in any form, directly or indirectly destroy, abridge, limit or render inefficacious."

It would therefore seem unnecessary to cite further authority upon that point to sustain the decree.

ing to accept the benefits. This allegation does not deny the discrimination between domestic corporations and foreign corporations. It in effect admits that the said act permits domestic corporations to bring their suits in federal courts in proper cases, and denies that right to foreign corporations.

The answer then (Record 14) admits that the defendant intended to cancel the license, and authority of plaintiff to do business in Arkansas *"for the reason that the said plaintiff had brought in the District Court of the United States for the Texarkana Division of the Western District of Arkansas, its suit at law against Paving Improvement District No. 20 of the City of Texarkana, Arkansas,"* and other defendants named therein, and also that it had removed a suit brought by those defendants in a state court, the suit in the state court, being brought on the same contract. It is then alleged in the answer, that the bringing of the suit by the plaintiff, and the removal of the other suit is a violation of the license granted by the state to the plaintiff to do business in Arkansas, and that the conduct of the plaintiff in thus bringing the suits, made it the duty of the defendant to cancel plaintiff's license. The answer therefore concedes that *the defendant intended to cancel the license solely on the ground that the plaintiff had resorted to the federal courts for its litigation.* This admission of the answer, as I view it, shows conclusively that the defendant intends to do an irreparable injury to the plaintiff in cancelling the license. It shows that the defendant has no power to cancel the license, except

that which is set forth in said Act of Arkansas. As the Arkansas Act is void, therefore the defendant is without power to cancel the license at all. The defendant cannot claim any power under a void act. An act which is void, gives no power to cancel. A void enactment is no enactment, and no one can claim any power thereunder.

Under Section 6 of Article 12 of the Constitution of the State of Arkansas, the General Assembly of Arkansas is without power to alter, revoke or annul any charter of a *domestic* corporation, *in such manner as to do an injustice to the corporation.* The State of Arkansas, under its constitution, is therefore prohibited from doing an injustice, even to a domestic corporation. Being without power to do an injustice to a domestic corporation and the rights of a domestic corporation and a foreign corporation admitted to the state, being the same, it would follow that the state, by reason of its own constitution, is prohibited from doing an injustice to a foreign corporation. The question is not one of granting to a foreign corporation or of withholding from a foreign corporation privileges and immunities granted to citizens by reason of Section 2 of Article 4 of the Constitution of the United States, as defined in *Paul* v. *Virginia,* 75 U. S. 168. The question to be determined is the validity or invalidity of the Act of 1907, which authorizes the Secretary of State to annul a license upon the ground that the foreign corporation has brought a suit in the Federal Court. If that clause of said act is void as this

court has held (216 U. S. 146) the defendant can do nothing under it regardless of his motive, whether good or bad. A good motive can give no validity to an act grounded on a void state enactment, and much less can a bad motive destroy a valid constitutional right. This claimed right to annul must be denied to the defendant under the Constitution of the United States upon three grounds, as I view it. First, the state cannot deprive foreign corporations legally admitted to the state, of their right to maintain their suits in the federal courts. Second, the defendant has no power under the Act of 1907, to revoke a license, because said act is in violation of the constitution. The act is void, and hence the Secretary of State is without power to do the wrong which he contemplates. Third, under Section 1 of the Fourteenth Amendment to the Constitution of the United States, the state is without power to discriminate between foreign corporations legally admitted to the state, and domestic corporations. Even if the state had the power to deprive a foreign corporation of its right to bring a suit in the Federal Court, it could not exercise that power in such a way as to discriminate on that ground against a foreign corporation.

In determining the federal question involved, it is worth while to consider the construction which the Supreme Court of Arkansas has placed upon Section 11 of Article 12 of the constitution of that state. In *Pekin Cooperage Co.* v. *Duty*, 140 Ark., 135, in giving a meaning to that clause of the constitution, the Supreme Court of Arkansas said: *"Under this clause of the constitu-*

tion, the regulations, limitations and liabilities imposed upon domestic corporations constitute the measure of the liabilities upon foreign corporations." It therefore appears from the construction which the Supreme Court of Arkansas has placed upon that clause, that foreign corporations legally doing business in the state must have every right which domestic corporations have. It is undoubtedly true that domestic corporations in the State of Arkansas have the right in a proper case, to maintain their suits in the federal courts. They may maintain such suits even against citizens of Arkansas in every case where the jurisdiction of the Federal Court is based upon an Act of Congress, or upon the Constitution of the United States. Within the last few years the jurisdiction of the United States courts has been remarkably increased by suits to enforce federal rights, such as under the Sherman Anti-Trust Law, and other Acts of Congress, and also by reason of suits brought by citizens of one state against citizens of the same state in the Federal Court for protection under the Fourteenth Amendment to the Constitution of the United States. Every day suits are brought by citizens of a state against citizens of the same state, under the Sherman Anti-Trust Law. Such suits are very numerous. The suits under the Fourteenth Amendment are more numerous. These suits are brought for the purpose of protecting property of public service corporations and other corporations from confiscatory rates and from otherwise taking the property of the corporations without due process of law. Every domestic corporation in Arkansas

may, therefore, sue in the Federal Court, a citizen of Arkansas, on any federal ground, to enforce a federal right, or to enforce a right protected by the federal constitution, or created by federal law. If the law in question is valid foreign corporations are denied that very valuable right. Hence they are denied federal rights which are enjoyed by domestic corporations, and hence are denied the equal protection of the laws.

The answer admits in effect that these rights are of high value. Whether the answer admits it or not, this court knows that these rights are of the very highest importance and value in modern commerce and modern business. Every domestic corporation therefore, has a right to resort to a Federal Court in the State of Arkansas, and there to maintain a suit against a citizen of that state, to protect its property and to enforce its federal rights. It will go without saying that those rights are valuable. This Act of Arkansas of 1907 denies those rights to a foreign corporation, and grants them to a domestic corporation. We therefore have this Act of 1907 not only attempting to deny to a foreign corporation the right to bring its suit in the Federal Court but also attempting to grant that right to a domestic corporation, and at the same time deny it to a foreign corporation.

Suppose two gas companies are operating in one of the great gas fields of Arkansas. Suppose one is a domestic corporation and the other is a foreign corporation. Suppose a municipal corporation in said state or the railroad commission of the state having power to

act fixes a rate against each of said corporations, which rate is confiscatory in the extreme. The said regulatory body fixes the same rate against the foreign corporation that it fixes against the domestic corporation. Suppose that such rate is so low that it actually takes the property of each corporation in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. If this Act of 1907 is valid, the foreign corporation cannot go into the Federal Court and seek relief. At the same time, the domestic corporation may go into the Federal Court and secure relief.

Again, suppose that there is a combination and a conspiracy among the citizens of the State of Arkansas to prevent a coal company, a foreign corporation, engaged in business in Arkansas, from moving its coal in interstate commerce. Suppose, at the same time, that there is a conspiracy against a domestic corporation by citizens of the state which has for its purpose the preventing of said domestic corporation from moving its coal in interstate commerce. Suppose that each of said corporations moves its entire product in interstate commerce. The right to enjoin that unlawful conspiracy is a federal right. The right to recover triple damages against the conspiracy of Arkansas citizens is a federal right. If this Act of 1907 is valid, the domestic corporation may go into the Federal Court and enjoin the conspirators, and the foreign corporation is denied that right.

Section 1828, erroneously referred to by the learned district judge in his opinion (motion 13) as Section

1827, expressly grants to foreign corporations *all the rights and privileges enjoyed by domestic corporations.* See Acts of 1899, of Arkansas, page 18, and also Acts of 1899 of Arkansas, page 305. The state cannot grant, impair, deny or withhold rights established by valid federal laws, and this is referred to to show that in moments of reason, the state yields to the supreme law of the land. This act of the state is declaratory of the Constitution of Arkansas heretofore referred to, and is declaratory of the purpose of the state of giving to foreign corporations precisely the same rights and privileges which are possessed by domestic corporations.

It is my view that the state is without power independently of its constitution and this statute, to forfeit the license of the plaintiff to do business in Arkansas, for the reason and on the ground that the State of Arkansas cannot add to or take from the jurisdiction of the federal courts. If mistaken in that, it certainly is the law that Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibits a state from permitting a domestic corporation to its citizens in the federal courts, and at the same time deny a foreign corporation authorized to do business in the state, from exercising the same right. That clearly is a denial of the equal protection of the law, guaranteed by the Constitution of the United States. As before suggested, the case is not one where a state is attempting to prevent the coming of a foreign corporation into its borders for the purpose of carrying on business. The plaintiff was within the state, and complying with its valid laws. It

had acquired under the sanction of the state, a large amount of property within its borders. It is submitted therefore, that the rule of this court in *Herndon* v. *C. R. I. & P. R. R. Co.*, 218 U. S., 135 applies. In that case this court said:

> "The corporation was within the state, complying with its laws, and had acquired under the sanction of the state, a large amount of property within its borders, and thus had become a person within the state, within the meaning of the constitution, and entitled to its protection. *Under the statute in controversy a domestic railroad company might bring an action in the Federal Court, or in a proper case remove one thereto, without being subjected to the forfeiture of its right to do business or to the imposition of penalties provided for in the act.* In all the cases in this court discussing the right of the states to exclude foreign corporations and to prevent them from removing cases to the federal courts, it has been conceded that while the right to do local business within the state may not have been derived from the federal constitution, the right to resort to federal courts is a creation of the Constitution of the United States, and the statutes passed in pursuance thereof."

This decision, as I view it, indicates that this court will not permit Section 1 of the Fourteenth Amendment to the Constitution of the United States to be violated by an invalid statute, depriving a foreign corporation legally doing business in the state, from maintaining its suits in the Federal Court *while at the same time permitting state corporations to sue in the federal courts.*

As before suggested, this court has actually held said Act of 1907 void, for the reasons heretofore set forth. *Ludwig* v. *Western Union Tel. Co.*, 216 U. S. 146.

See cases cited in former brief, pages 16 to 20. The case of *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, relied upon by the appellant, does not meet the question. In that case, there did not arise any question of discrimination, and a denial of the equal protection of the laws, as between domestic corporations and foreign corporations. The Fourteenth Amendment prohibits such discrimination. The Constitution and statutes of Arkansas prohibit such discrimination. It is unnecessary to discuss the proposition as to whether the Doyle case has been modified, questioned, criticised or overruled. As the question involved here was not involved there, that case affords no authority for a reversal of this decree.

The appellant again relies upon the case of *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 246. The question involved here, it is respectfully submitted, was not involved in the Prewitt case. Waiving the question therefore, as to whether the Prewitt case has been weakened and substantially overruled by later decisions, it is respectfully submitted that the question involved here did not arise in that case.

The invalidity of the Act of Arkansas under consideration is demonstrated by some additional reasons. The plaintiff, for four years, had been doing business under state authority. It had acquired business and property in the state. It does seem that to forfeit its

license on the ground that it was exercising a federal constitutional right, amounts to depriving it of its business and property, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, because its property is thus being taken without due process of law, and it is being denied the equal protection of the laws. If that can be done valid constitutional federal laws may be nullified by state laws. When has it ever been admitted or declared that a state can nullify a constitutional federal law? How can a state destroy a valid federal right? If a state may lawfully penalize the exercise of a federal right, it may destroy that right. The power to penalize and prevent includes the power to destroy. If the state can punish for the exercise of valid federal right it may destroy that right. If the state may do this, the nation disintegrates and falls and the state becomes supreme. Acting under the authority of the license, the plaintiff built up a good will, which is in itself property. That good will will be destroyed by this sudden action on the part of the Secretary of State. In addition, it is my view that the state has not acted at all. *A void act is no act.* A state can speak and act only through its legislative enactments. *If a state attempts to speak through a void legislative enactment, the state does not speak.* The defendant is attempting to carry out a supposed duty, which is no duty because it rests upon a void act of the General Assembly. There is no enactment, and hence no declaration by the state, that the Secretary of State may forfeit this license for any reason

other than that set forth in the act. That act being void, the Secretary of State is without authority. He cannot base a valid action upon a void enactment. Hence, he is without authority to annul the license. This void act amounts to taking property without due process of law. This illegal enactment affords him no justification.

It is respectfully submitted that the principle underlying every case in this court on the subject, is that if an officer attempts to justify an official act under the authority of a void statute, said officer is without protection, and his acts or proposed acts, are wholly unjustifiable, illegal and void. I understand this to be the rule of this court in *Barron* v. *Burnside*, 121 U. S., 186. The legislature of Arkansas has not commanded the Secretary of State to cancel the license of appellant for any bad reason or any reason at all, because the state cannot through a void enactment. It has not given him the authority to cancel said license, except as it speaks through said void act. It therefore is not a case of a state acting on a good reason or a bad reason. The said act is wholly void. Therefore, the state has not spoken on the subject at all. It has not commanded the Secretary of State to revoke the license because it can only speak through valid acts. All state powers must be exercised consistently with the privileges and rights granted by valid federal laws.

Berry Steamship Co. v. *Kane*, 170 U. S. 100.
Blake v. *McClung*, 172 U. S. 255.

The state can impose no conditions upon a foreign corporation repugnant to the Constitution or laws of the United States.

Cable v. *U. S. Life Ins. Co.*, 191 U. S., 288.
Dayton Coal Co. v. *Barton*, 183 U. S. 85.

It is a grave question for states to attempt to destroy federal rights. If the power be once conceded that a state may destroy federal rights, the end of the Union as a nation has commenced. If every state in the Union has legal power to pass the law in controversy, then every corporation is prevented from exercising its constitutional federal right, to sue in the Federal Court, except in the state of its creation. The effect of such an unjust rule would be to strike down the jurisdiction of the United States courts.

As before suggested, the State of Arkansas has not elected to grant a limited license. In Arkansas, when once admitted, a foreign corporation remains until it is excluded by the state. The right of the state to exclude it is conceded, provided it is based upon valid grounds. It cannot exclude it however, so as to do an injustice to the corporation, and so as to deny the corporation the exercise of a right granted by the federal constitution. When the state admitted the corporation to do business in the state, it did so with full knowledge that the Act of 1907 had been declared illegal and void by this court. It is respectfully submitted that all the cases hold that an officer who attempts to do an act under the authority of a void law, and to the injury of a foreign corporation,

may be enjoined. His void act will do an irreparable injury. If the State of Arkansas has passed a law, giving power and discretion to the Secretary of State to exclude a foreign corporation at his discretion, without any reason, a different question might arise. That is not the case at bar. The defendant is not given the power to cancel the license for any or no reason. He is not given the power to cancel the license at his discretion. He is only given power to cancel a license for a reason set forth in a void statute. Therefore, the defendant stands without legal authority, in doing the act which he threatens to do.

A state cannot destroy a federal right of a foreign corporation by compelling that corporation to surrender under penalties, that right. It may exclude a foreign corporation altogether. But having admitted it, under an unlimited license, the state cannot destroy its federal right by penalizing it. Even if that be a mistaken view, the appellant must fail, because he is not the state itself, and the state has not passed any valid law empowering him to revoke the license, and further because the state having admitted the foreign corporation into its borders, cannot deny its right to sue in the federal courts, and at the same time grant that right to domestic corporations without violating the Fourteenth Amendment, by denying equal rights and the equal protection of the law.

It is therefore respectfully submitted that the cause should be affirmed.

JAMES B. MCDONOUGH,
Counsel for Appellee.

TERRAL, AS SECRETARY OF STATE OF THE STATE OF ARKANSAS, *v.* BURKE CONSTRUCTION COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 93. Argued January 17, 1922.—Decided February 27, 1922.

A state law which revokes the license of a foreign corporation to do business within the State because, while doing only a domestic business within the State, it resorts to the federal court sitting in the State, is unconstitutional. P. 532. *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535, and *Security Mutual Life Insurance Co.* v. *Prewitt*, 202 U. S. 246, *held* to have been overruled.

Affirmed.

ERROR to a decree of the District Court enjoining the appellant from revoking the license of the appellee corporation to do business in Arkansas.

Mr. J. S. Utley, Attorney General of the State of Arkansas, and *Mr. Frank S. Quinn*, for appellant, submitted.

It is alleged in the bill that the complainant is engaged in interstate commerce. The averment is overcome by the denial in the answer. *Iowa* v. *Illinois*, 147 U. S. 7.

The act in controversy is not repugnant to the Constitution as an undue requirement or regulation of a foreign corporation not engaged in interstate commerce. *State* v. *Hodges*, 114 Ark. 155; *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535; *Security Mutual Life Insurance Co.* v. *Prewitt*, 202 U. S. 246.

After the *Doyle* and *Prewitt Cases*, came the decisions in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Herndon* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 135; and *Harrison* v. *St. Louis & San Francisco R. R. Co.*, 232 U. S. 318. Those cases held that any state regulation of interstate commerce was void. In *Wisconsin* v. *Philadelphia & Reading Coal & Iron Co.*, 241 U. S.

329, the question was again before this court. In that case the company was engaged in interstate as well as intrastate commerce.

The conclusion to be reached, as we conceive it, from the above decisions, is, that, in determining the validity of the act here in question, the facts surrounding this particular case must control; if the appellee is not engaged in interstate commerce and is not a foreign commercial corporation, then the act is constitutional as to it.

Mr. William Marshall Bullitt, with whom *Mr. James B. McDonough* was on the briefs, for appellee.

MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

This is an appeal from the District Court under § 238 of the Judicial Code, in a case in which the law of a State is claimed to be in contravention of the Constitution of the United States.

The Burke Construction Company, a corporation organized under the laws of the State of Missouri, filed its bill against Terral, Secretary of State of Arkansas, averring that it had been licensed to do business in the State of Arkansas under an act of the Arkansas Legislature approved May 13, 1907; that it was organized for the purpose of doing construction work, and carrying on interstate commerce, and was actually so engaged in Arkansas; that the right to do business in the State was a valuable privilege, and the revocation of the license would greatly injure it; that it had brought an original suit in the federal court of Arkansas and had removed a suit brought against it to the same federal court; that the Secretary of State was about to revoke the license because of such suit and such removal, acting under the requirement of § 1 of the Act of the Legislature of Arkansas of May 13, 1907, reading as follows:

"If any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in this State; and if such corporation shall thereafter continue to do business in this State, it shall be subject to the penalty of this Act for each day it shall continue to do business in this State after such revocation."

The penalty fixed is not less than $1,000 a day. The Construction Company avers that this act is in contravention of § 2, Article III, *i. e.*, the judiciary article of the Federal Constitution, and of § 1 of the Fourteenth Amendment.

The defendant filed an answer in which there were many denials. One was that the complainant was engaged in interstate commerce. The answer did not deny, however, that the complainant was a foreign corporation, that it had been duly granted a license to do business in the State of Arkansas, that its right to do business in the State thus licensed was a valuable right, that the complainant had brought suit in the federal district court and removed another case to that court, that such suit and removal were violations of the license granted by the State of Arkansas, or that the defendant intended to cancel the plaintiff's license. The case was heard on bill and answer, and is to be considered on the averments of the bill which are not denied by the answer. *Iowa* v. *Illinois*, 147 U. S. 1, 7.

The sole question presented on the record is whether a state law is unconstitutional which revokes a license to a foreign corporation to do business within the State be-

cause, while doing only a domestic business in the State, it resorts to the federal court sitting in the State.

The cases in this court in which the conflict between the power of a State to exclude a foreign corporation from doing business within its borders, and the federal constitutional right of such foreign corporation to resort to the federal courts has been considered, can not be reconciled. They began with *Insurance Co.* v. *Morse*, 20 Wall. 445, which was followed by *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535; *Barron* v. *Burnside*, 121 U. S. 186; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202; *Martin* v. *Baltimore & Ohio R. R. Co.*, 151 U. S. 673, 684; *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100, 111; *Security Mutual Life Insurance Co.* v. *Prewitt*, 202 U. S. 246; *Herndon* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 135; *Harrison* v. *St. Louis & San Francisco R. R. Co.*, 232 U. S. 318, and *Wisconsin* v. *Philadelphia & Reading Coal & Iron Co.*, 241 U. S. 329.

The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the

limitations of the supreme fundamental law. It follows that the cases of *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535, and *Security Mutual Life Insurance Co.* v. *Prewitt*, 202 U. S. 246, must be considered as overruled and that the views of the minority judges in those cases have become the law of this court. The appellant in proposing to comply with the statute in question and revoke the license was about to violate the constitutional right of the appellee. In enjoining him the District Court was right, and its decree is

Affirmed.